111-505

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 346.

THE PACIFIC RAILROAD COMPANY OF MISSOURI, APPELLANT,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, CORNELIUS K. GARRISON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 8, 1881.

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A UNITED STATES OF AMERICA, } ss.
Eastern district of Missouri, }

In the circuit court of the United States in and for said district.

Be it remembered, that on the twenty-sixth day of June, A. D. 1881, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain bill of complaint in words and figures following, to wit:

1 Circuit court of the U. S., eastern district of Missouri.

Pacific Railroad (of Missouri), complainant,

vs.

Missouri Pacific Railway Company, Cornelius K. Garrison, Wm. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuel, Joseph L. Stephens, also Henry F. Vail and Jas. D. Fish, trustees, under deed of trust dated July 10th, 1875, (3d mortgage trust;) Henry F. Vail and James D. Fish, trustees, under deed dated December 14th, 1874, (improvement bond trust;) A. V. Stout and T. B. Edgar, trustees, under deed dated September 1st, 1872, (income bond trust;) Thomas W. Pierce, James Seligman, George E. Ketchum, and The Central Trust Company & James Baker, defendants. } In Equity.

Bill to set aside decree entered in this court June 6th, 1876, in case of George E. Ketchum vs. *Pacific Railroad et al. for fraud.*

2 To the honorable judges of the circuit court of the United States for the eastern district of Missouri:

Your orator, the Pacific Railroad (of Missouri), brings this its bill of complaint, and respectfully complains, shows, and avers to this court:

1st. That it, the Pacific Railroad, is a corporation incorporated by the state of Missouri, having its principal place of business in the city of St. Louis, in said state of Missouri, and in the eastern district of said state, and a citizen of the state of Missouri.

2d. That the defendant, the Missouri Pacific Railway company, is a corporation incorporated under the laws of the state of Missouri, and a citizen of the state of Missouri, and has its principal place of business in the city of St. Louis, in said state.

That the defendants Oliver Garrison, D. R. Garrison, Webb M. Samuels, Joseph L. Stephens, & James Baker, also T. B. Edgar, trustee, as hereinafter set forth, are all and each of them citizens of the state of Missouri, and all, except said Stephens, reside in the city of St. Louis, and said Stephens reside in Boonville, in said state.

That the defendant Thomas W. Pierce is a citizen of the
3 state of Massachusetts, and resides in the city of Boston, in said state; that the defendants Cornelius K. Garrison, Wm. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, also Henry F. Vail and James D. Fish, trustees, as hereinafter set forth, and James Seligman and George E. Ketchum, are citizens of the state of New York and reside in the city of New York.

That the Central Trust company is a corporation incorporated by the state of New York, and has its principal place of business in the city of New York, and is a citizen of said state.

3d. That each of the defendants had knowledge of and were parties to the frauds and misconduct herein complained of, either at their inception or by subsequent subrogation.

4th. Your orator complains and says that heretofore, viz., on or about the 11th day of November, 1875, the said George E. Ketchum filed his bill of complaint in this court against your orator, the Pacific Railroad, the Atlantic and Pacific Railroad company, James Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the state of Missouri, and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the state of New York.

4 That a copy of said complaint is hereunto annexed, marked "Exhibit A," to which your orator begs leave to refer with the same effect as if here set out at length, and he makes the same a part hereof.

That upon the petition of C. K. Garrison, James Seligman, and Thomas W. Pierce, these were each of them made complainants in said Ketchum suit before the decree was entered, April 3d, 1876. That Garrison applied by his solicitors, Cline, Jamison & Day, and Seligman and Pierce by their solicitors, Grover & Ellis, that the solicitors were in each case instructed to receive their instructions from and be advised by James Baker, who was the solicitor of your orator, and that they did follow said Baker's instructions.

5th. That such proceedings were had in this court upon said complaint; that a decree of foreclosure and sale was made of the premises described herein, the railroad and property of your orator, on or about the 6th day of June, 1876, and a sale of the premises made in pursuance thereof, which sale was confirmed by this court on or about the 6th day of October, 1876, copies of which decree
5 and of the deed of the master, and of the order of the court confirming the same, are hereunto annexed and made a part hereof, as Exhibit "B" and "B" continued.

6th. That said decree gave no relief, or in any way affected therein the other defendants in said named, viz., the Atlantic and Pacific Railroad company, James Baker, Rufus J. Lackland, Dwight Durkee, Edwin D. Morgan, Joseph Seligman, Urial A. Murdock, James Punnett and Luther C. Clark, (each of the last two named are now deceased;) hence the above named defendants in the Ketchum suit are not made parties to this suit.

7th. Your orator avers that it sought redress for the injuries sustained by it as above and herein alleged by taking an appeal, February 1st, 1877, from said decree, and from the order confirming said sale, to the supreme court of the United States, at the first term of said court held after the entry of said decree and order of said circuit court, (the second Monday in October, 1877;) that the supreme court could not hear your orator until January, 1880, and did not give its opinion on said appeal until April, 1880, when it gave its opinion
6 that your orator could not get redress on appeal, but that your orator must apply for relief in the court where the fraud was perpetrated; that your orator immediately petitioned said court to rehear said appeal; that the supreme court entertained said petition and did not dispose of it until May 10, 1880, when it denied said petition for a rehearing; whereupon your orator comes at once to this court where the fraud was perpetrated and humbly petitions for the relief herein below prayed for.

8th. Your orator avers that the aforesaid decree was procured to be made by this court through and by false and fraudulent representations made by the defendants herein named, in collusion and confederacy with themselves and with others, as is more fully herein below set forth, so that said decree so procured by fraud is void and should be set aside and for nothing had.

9th. The particular frauds committed by these defendants and their confederates, your orator avers to be—

(A) That the decree and the master's deed designedly and
7 fraudulently embraced more, other, and different property of your orator than was embraced in the mortgage deed being foreclosed, viz., a large amount of property described in the decree and in the master's deed in the following language, which your orator avers was fraudulently and without the knowledge of your orator interpolated into the decree and into the master's deed, viz:

"Including among other things the track on Poplar street and the levee in the city of St. Louis, commonly known as the 'Poplar-street track.'"

Your orator avers that said Poplar-street track was never mortgaged by your orator or by any one else to said Vail and Fish, and was and is the property of your orator free and unincumbered, and that it is of great value, it being the principal if not the only avenue or railroad by which traffic can be taken from the freight depots in St. Louis to the Mississippi river; that the pecuniary value of said property so fraudulently embraced in the decree and sold is more than the sum of $200,000.

(B). Your orator avers that the above and large blocks of other property, real and personal, not embraced in the mortgage, which has been fraudulently and wrongfully handed over to the
8 purchasers at said sale, viz., $750,000 of the bonds of the Atlantic and Pacific Railroad company, known as "equipment bonds," the payment of which was secured by a mortgage upon certain rolling stock and equipment on the road of and used by said

Atlantic and Pacific Railroad company, which said $750,000 of bonds belonged to your orator, and were not pledged or hypothecated to said Vail and Fish, and were in no way, manner, or form security for the payment of their pretended debt against your orator.

(c) Also a large and valuable tract of land at Kansas city, known as the cattle yards, and other property, real and personal, which your orator is unable at this time to more fully or definitely describe, but which it prays the court to be allowed hereafter to do, when it can get the required information to do it with exactness and certainty.

10th. That the Atlantic and Pacific Railroad company was the lessee of the Pacific Railroad, as is more fully shown in a copy of the lease, excepting the signatures of the proper officers
9 thereto, hereunto attached, marked "Exhibit C," to which your orator asks leave to refer with the same effect as if here set out at length. Your orator avers that said lease was duly signed, sealed, acknowledged, and delivered, and possession of the premises described therein given to and taken by said Atlantic and Pacific Railroad company.

That in and by the covenants of said lease the Atlantic and Pacific Railroad company assumed obligations enumerated in said lease, and to pay a rental for said premises, which it became unable to pay, and thereupon said company and its managers conceived the idea of destroying its creditor, that it by so doing might evade the payment of its just debts due to your orator.

11th. Your orator avers that on and before June, 1872, the chief officers and directors of the Atlantic and Pacific Railroad company, who then consisted of Andrew Pierce, jr., Joseph Seligman, A. V. Stout, and others to your orator unknown, procured the ownership or control of a majority of the capital stock of the said Pacific Rail-
road for the avowed purpose of procuring the complete and
10 perpetual control of all the assets and road of said Pacific Railroad; and in execution of such design the said directors and officers of the said Atlantic and Pacific Railroad company, thus controlling the stock of the said Pacific Railroad, procured a lease between said two corporations to be executed, viz, on June 29th, 1872, which is herewith set out as Exhibit "C."

That immediately upon the execution of said lease the said Atlantic and Pacific Railroad company entered into the full and exclusive possession of and dominion over the said Pacific Railroad and all its property, franchises, and revenues; and the then officers and directors of said Pacific Railroad were supple and convenient agencies to do and perform such formal corporate acts as were demanded to be done by said Atlantic and Pacific company to carry out its purposes; and since the said June, 1872, to the present time the said Pacific Railroad has not been in the possession, use, or enjoyment of any of its property, except the receipt of rents under said lease from June, 1872, to July, 1875.

12th. That since the commencement of said lease there has
11 been paid to the stockholders their dues under the rental continuously up to July, 1875, but the installments since that time have not been paid; and there has been fully and promptly paid and discharged to the divers holders all the interest installment falling due up to the time said decree was entered, and since to the present time upon all the different issues of bonds aforesaid, and upon the demand of the county of St. Louis, so that the said Pacific Railroad was not in default in any bonded or mortgage debt or liability which existed when the said Atlantic and Pacific Railroad company took exclusive possession and charge of its property.

13th. Your orator avers and so charges that pending the operations of said lease the said Atlantic and Pacific Railroad company, on false and fraudulent representations, falsely and fraudulently claiming and pretending that your orator was indebted to the Atlantic and Pacific Railroad for expenditures and disbursements made by the last named company to improve the property of your orator, and exhibiting and showing false statements of the accounts
12 between the two companies, some of which were purposely and knowingly made to be false by charging interest and operating expenses, one or both, of one year against the earnings of a preceding year by charging thirteen months' expenses against twelve months' earnings, and in other ways at present to your orator unknown procured the Pacific Railroad to execute and deliver to said lessee corporation three different issues of bonds, as follows:

Income bonds, dated August 27, 1872, for $1,500,000, to the defendants A. V. Stout and T. B. Edgar, trustees, falsely alleged to be for the payment of the floating debt of the Pacific Railroad and the improvement of the leased property.

Improvement bonds, dated December 11th, 1874, for $2,000,000, to Henry F. Vail and James D. Fish, trustees, falsely alleged to be for "the payment of the floating debt of the Pacific Railroad, the improvement of the demised property, the purchase of additional equipment, and the redemption of its mortgage or income bonds."

Third mortgage bonds, dated July 10, 1875, for $4,000,000, falsely alleged to be issued "to retire said income and improve-
13 ment bonds," which were not liens on the property, and the proceeds of the remaining $500,000 to be applied to the payment of floating liabilities of the Pacific Railroad, the permanent improvement of its property, and the redemption of its first and second mortgage bonds, which floating liabilities of debts pretended to be due from your orator to said Atlantic and Pacific Railroad were predicated upon false and fraudulent statements of the accounts between the two companies, submitted to the meeting of the directors of the Pacific Railroad by said Andrew Pierce, who was the general manager, or by his order; said accounts were false and fraudulent in this: that operating expenses and interest, either or both, were charged in the statements submitted against the earnings of a preceding year or month, so that thirteen or more months of inter-

est or operating expenses, either or both, were charged against twelve months' earnings, charging to your orator vast sums for matters which, by the lease, said Atlantic and Pacific Railroad company had bound itself to pay, and the then agents or directors of your orator were deceived and misled by said false and fraudulent state-
14 ments so made or caused to be made by said Andrew Pierce and other officers and agents of said Atlantic and Pacific Railroad company."

Your orator avers that the references and representation in said several issues of bonds to the payment of the floating of the Pacific Railroad, to the improvement of its property, the purchase of additional equipment, and the redemption and retirement of its bonds, were all and each of them falsely and fraudulently made, and were mere subterfuges and pretences used by the Atlantic and Pacific Railroad company, and by its officers and agents, to give the said bonds an apparent validity; that said references and representations were each and all of them false in fact; that the money in each and every case got by sale or hypothecated of said bonds went to the Atlantic and Pacific Railroad company, or for its use and benefit, or for the use and benefit of the persons making said false and fraudulent representations.

And your orator avers that the said Atlantic and Pacific Railroad company, and its officers and agents, disposed of the said $1,500,000 of income bonds, and used the said $2,000,000 of improvement
15 bonds, and a large portion of the said $4,000,000 so-called third mortgage bonds, as collateral security for the payment of its own debts, to enable it to borrow money and carry such debts, and that said bonds, or the proceeds of the sale thereof, were not used for the use or benefit of said Pacific Railroad.

14th. That at or before the time of commencing said foreclosure suit, viz., November 11th, 1875, the said Atlantic and Pacific Railroad company became indebted, or under some obligations, to the following persons and corporations; the amount of the debt or the character of the obligation is to your orator unknown, but your orator avers that said persons then held said third mortgage bonds, claimed to have been made by your orator, as collateral security for the obligations of the Atlantic and Pacific Railroad company to the face amount set opposite to their respective names, viz:

T. W. Pierce, one of the defendants herein	$67,000
C. K. Garrison, " " "	190,000
J. & W. Seligman & Co.	34,000
J. B. Colgate & Co.	100,000
Andrew Pierce	10,000
16 D. L. Caldwell	15,000
National Bank of Commerce, N. Y.	300,000
National Shoe and Leather Bank, N. Y.	50,000
Marine National Bank, "	70,000
Fourth National Bank, "	50,000

Continental National Bank, N. Y.	$100,000
National Bank of the Republic, N. Y.	50,000
Beaver Branch R. R.	9,000
National Bank of Commerce, Boston	150,000
Continental Bank, St. Louis	50,000
Mechanics' Bank, "	220,000
Valley National Bank, St. Louis	89,000
Total	$1,554,000

(A) The Bank of Commerce also had $630,000 of other bonds not made by the Pacific Railroad held as collateral.

The Citizens' Savings Bank of St. Louis had $100,000 of said improvement bonds as collateral, which were subsequently exchanged for said third mortgage bonds, increasing the total to $1,654,000 of said third mortgage bonds that your orator has thus far been able to trace of its bonds held as collateral security for the payment of the debts of the Atlantic & Pacific Railroad company.

15th. Your orator avers that on or about the 19th day of
17 October, 1876, the defendant C. K. Garrison was examined orally in said Ketchum case, and answered:

"That he was one of the complainants in the suit against the Pacific Railroad company; I am the owner of over $1,500,000 of the bonds I have presented (the third mortgage bonds); the balance I represent the owners of."

16th. Your orator avers that in and by the covenants and agreements contained in said case the Atlantic and Pacific Railroad company assumed and promised to pay all and singular the debts and obligations of the said Pacific Railroad, and discharge such debts, principal and interest, and to stand in its place and stead with reference thereto, and to further pay and *and* discharge all and singular the expenses of the operating, constructing, and repairing the said demised railroads, and also all the interest on bonds to be issued after the date of said lease for the purpose of extending the lines of said roads, acquiring depots or rolling stock, and also to pay all the expenses of operating and rental for certain franchises.

17th. Your orator avers that the said pretended increase of mort-
gage debt of the Pacific Railroad of $4,000,000 between July
18 1, 1872, and July 10, 1875, is fictitious, fraudulent, without consideration, and contrary to the laws of the state of Missouri, and in that behalf the petitioner avers that the gross revenue of the Pacific Railroad from the date of the lease to—

December 31, 1874, was	$8,496,542 90
And the operating expenses	4,998,278 51
Leaving a net revenue of	$3,492,564 33

That during such period the said lessee paid out for interest on—

Pacific R. R. bonds	$1,909,864 15
And for dividends on stock	843,229 50
Leaving a net income of	$739,172 68

as the result of the operations of the Pacific Railroad under said lease.

That notwithstanding such fact the said Atlantic and Pacific Railroad company and its officers, with the co-operation of their appointees, the officers of the Pacific Railroad from time to time procured, as your orator avers, the fraudulent audit of false and fictitious claims and expenditures in its behalf, and by charging up to the Pacific Railroad the alleged losses on leased lines which had been assigned to and assumed by said Atlantic and Pacific Railroad
19 company, and also the interest on income, improvement and other bonds which, under the lease, it had agreed to pay, and also charging up pretended expenditures for betterments on such assigned branch or leased lines, and also by charging operating expenses and interest incurred and accrued to prior time, that is to say, thirteen or more months of expenses and interest, either or both, against twelve months' earnings or some less time, the said Atlantic and Pacific Railroad company falsely and fraudulently pretended it was the creditor of said Pacific Railroad to a very large amount, for the liquidation or security of which debt it demanded, from time to time, the issue of the three series of bonds above described.

18th. That as to the recital contained in said bonds, that they were issued for the purpose of procuring additional rolling stock for said Pacific Railroad, the reports of the officers of said Atlantic and Pacific Railroad company show, and so your orator charges the fact to be, that during the lease no new engines were placed on the line, and that change in the equipment was as follows:

20	June, 1872.	Nov., 1875.
Passenger cars	79	78
Caboose cars	43	47
Box "	624	814
Stock "	371	319
Flat "	287	351

being an increase in three years of only 207 freight cars and no change in the number of engines, and one less passenger car, not enough to faithfully and fairly keep the covenants of said lease.

Your orator charges the fact to be that the pretended debt of $1,371,738.97 charged up against the said Pacific Railroad, and recited as the nominal consideration of the issue of said improvement bonds, was wholly fraudulent and fictitious; that, in fact, the net revenues and incomes of the said Pacific Railroad has been ample to pay for all the expenditures of such additional equipment and for all the

increased value of steel over iron rails, and all the other improvements and permanent betterments of said Pacific Railroad.

19th. Your orator avers that while the gross and net revenues of said Pacific Railroad were large, that the earnings of the line
21 belonging to said Atlantic and Pacific, and the branch lines assigned or transferred to it, and to be operated for its account, were wholly insufficient to liquidate its necessary operating expenses and the interest on the bonds on its own and the branch lines, and it was forced to borrow large sums of money and to resort to divers shifts and devices to procure and float such loans, and that it and its officers, for the purpose of procuring an issue of bonds of the Pacific Railroad, to be delivered to it so as to be used as collateral security for the payment of the debt of said Atlantic and Pacific Railroad company from time to time, it preferred these false and fraudulent accounts, and procured its officers, who were also the majority of the board of directors of the Pacific Railroad, to audit such charges, and, upon the basis thereof, to execute the several bonds aforesaid, and in their inception they were false and fraudulent tokens of a pretended debt which never existed in fact, and never had any other or better consideration to give value to said bonds or debt.

20th. Your orator avers that the said Pacific Railroad com-
22 pany had no lawful capacity, under its charter, to execute such third mortgage, or issue the $4,000,000 bonds therein described, or to deliver them to the said Atlantic and Pacific Railroad company, or to use them for the purposes therein described, and therefore your orator avers that the said mortgage and bonds are and were not authorized, and that the issue thereof was beyond the corporate power of said mortgagor to execute and deliver and are void, and all the acts or pretended acts of the corporation in this respect ultra vires.

Your orator avers that the law of the state of Missouri only authorizes mortgages of railroad property to be made "for the purpose of borrowing such sums of money as may be necessary for the completion, equipment, and repair of its road, and to fund its floating debt," and that no issue of bonds shall be valid without the vote and ratification of the stockholders.

21st. That the only pretended authority the directors of the Pacific Railroad had, or that the Atlantic and Pacific Railroad company had, to make, issue, and deliver the mortgage commonly called "the third mortgage," a copy of which is hereto attached marked
23 "D," is shown by a circular issued by Samuel Hays, president, to the stockholders of the Pacific Railroad, accompanied by a blank form of proxy, copies of which are hereunto attached marked "E," to which your petitioner begs leave to refer.

That neither said circular nor said proxy professes to authorize, or does in fact authorize, the making a mortgage of $4,000,000, or of any mortgage of any amount whatever.

22d. Upon information and belief, and official reports made by said Atlantic and Pacific Railroad company to its creditors and stock-

holders, your orator avers the fact to be, that the said Atlantic and Pacific Railroad company did not negotiate absolutely any of the said $2,000,000 improvement bonds, but used them as a means to aid its credit in borrowing money, and that the same were knowingly devised for that purpose; such loanes being made on its paper as heretofore shown, and in other ways and manner to your orator unknown, and from other individuals and banking institutions in which the directors of said Atlantic and Pacific Railroad company
24 were interested or had influence enough to get loans. That the aggregate of such paper of the Atlantic and Pacific Railroad company was about $1,600,000, and several of the directors of said Atlantic and Pacific Railroad company, and officers of said Pacific Railroad, were endorsers on said paper.

That in the month of July, 1875, when the said officers and directors were such endorsers, and the said entire $2,000,000 improvement bonds were hypothecated as aforesaid, the said third mortgage was procured to be executed fraudulently, and without any consideration whatever as to *to* said $1,500,000 income and $2,000,000 improvement bonds, but intending to benefit the security of such banks and protect the directors of said Atlantic and Pacific Railroad company by turning out, if practicable, the valuable property of the Pacific Railroad to the creditors of the Atlantic and Pacific Railroad company and therefore, by procuring the proxies of brokers and others who were pledgees, but who were not in fact stockholders, and the presentation of such false and fraudulent claims, they procured the execution of
25 said so-called third mortgage, and the issue and delivery of them of said $4,000,000 bonds, and claim to have appropriated $1,500,000 to the retirement of income bonds, and sold an inconsiderable portion prior to the commencement of said suit by said Ketchum, and the remainder of said $2,500,000 was delivered over as collateral security for the payment of the precedent paper of said Atlantic and Pacific Railroad company, including that held by the banks and individuals hereinbefore named, and such collateral bonds were so held when said foreclosure suit was brought, in November, 1875, and therefore the said Garrison, Seligman, and Sage, with full knowledge of the facts invalidating the issue and consideration of such bonds, purchased at heavy discount of some of said banks the past-due paper of said Atlantic and Pacific Railroad company, with the accompanying third mortgage bonds.

And in truth and fact, petitioner charges that the directors or some of them, and former officers of said Pacific Railroad are interested in such bonds, or the notes or evidences for which said bonds
26 were held as collateral for the payment thereof, and are and have, contrary to their trusts, vigorously prosecuted said foreclosure suit, so as to become possessed of the valuable corporate property of your orator at a great sacrifice, and to the entire destruction of the interests of the stockholders of said corporation.

22d. (A) Your orator avers that by so purchasing said bonds, knowing them to be held as collateral security, said Garrison, Sage,

and other purchasers became liable to account to your orator, and after being paid the cost of said bonds less the amount of money they have received thereon, they in equity should deliver the bonds back to your orator.

23d. Your orator avers that the defendants A. V. Stout, James D. Fish, Daniel R. Garrison, Webb M. Samuels, Wm. R. Garrison, and C. K. Garrison were during all such transactions, up to the commencement of the foreclosure suit, were either directors of the Atlantic & Pacific R. R. company or of the Pacific Railroad, or creditors, or otherwise interested in said Atlantic & Pacific R. R. company, and benefited by said frauds, and were in fact and in law fully cognizant
of the creation of such illegal and fraudulent bonds and all
27 the circumstances connected therewith, of the false charges of
expenditures preferred by said Atlantic & Pacific company, of the placing of the majority of said bonds as collateral security for the payment of the precedent debt of the Atlantic & Pacific Railroad company with their own banks and others, and of the subsequent purchase of large amounts of such defaulted paper and accompanying collateral bonds by Garrison, Sage, and others, and that they are not holders in good faith and in the usual course of business of said bonds, and that they fraudulently and wrongfully concealed all such facts from the knowledge of the court while it was considering said case of Ketchum *vs.* Pacific Railroad.

24th. Your orator avers that the defendant C. K. Garrison made an agreement with Andrew Pierce, James Baker and D. R. Garrison, or with some of them, to the effect that if they, controlling as they did the defence to the Ketchum suit, would consent to a decree in the manner and form in which consent to the entry of said decree was given, that he, C. K. Garrison, would pay all
the debts of the Atlantic & Pacific Railroad company,
28 on which said individuals, or either of them, were endorsers or guarantors, and would save them harmless for said endorsements or guarantees, if he could have the bonds held as collateral security for the payment of said debts; that in pursuance of said agreement, or one in substance like it, the said C. K. Garrison did pay or purchase all of said debts, and took all of said Pacific Railroad improvement or third mortgage bonds held as collateral for the payment of said debts; and said Pierce, Baker, and D. R. Garrison wrongfully caused said decree to be entered, and falsely set forth that your orator consented to said decree and authorized the action of said Baker in the premises.

25th. Your orator avers upon information and belief that prior and subsequent to the 1st of November, 1875, James Baker, one of the directors of said Pacific Railroad and its general attorney, together with Andrew Pierce, also a director in said Pacific Railroad,
and with others to your orators unknown, confederated to-
29 gether with the defendants in this case, or with some of them, for the purpose of instituting proceedings to foreclose the said third mortgage for the entire issue of $4,000,000, and thus in be-

half of themselves and confederates divest your orator of all its property, and obtain it themselves, or for C. K. Garrison and associates, for a sum greatly less than its real value, and in execution of such common purpose the said Baker and Andrew Pierce and their confederates, prior to the 1st of November, procured to be printed the bill of foreclosure in said Ketchum case, and filed it in the circuit court of the United States for the eastern district of Missouri, and procured the complainant therein named, George E. Ketchum, to allow his name to be used as complainant therein, and the said bill was actually sworn to in the city of New York before the coupons were in default; and without waiting the six months required by the terms of the trust deed, or procuring the request of the requisite number of bondholders, they at once proceeded to institute such foreclosure suit by the service of sub-
30 pœna upon said Baker, who, without any authority from your orator so to do, admitted service thereof in the name of your orator; and thereupon the said Baker, without any authority from your orator, filed the answer of said Pacific Railroad, falsely and fraudulently admitting that the said third mortgage was duly and legally executed, and the bonds were held in good faith, and that your orator was bound to pay the principal and interest thereof, when he and his confederates well knew the facts invalidating the issue and consideration of such bonds, as aforesaid, and that they were illegally issued and illegally held as collateral security, and that a large amount of the same were not at that time issued at all, viz., the sum of $500,000.

26th. Your orator prays liberty to refer to the files and records of said United States circuit court in the case of George E. Ketchum *vs.* Pacific Railroad et al. to show the collusive, irregular, and fraudulent character of the legal proceeding instituted with advice
31 of said Baker, the counsel of your orator, to sell all its property for the enforcement of a security which your orator avers to be fraudulent and void, and for which your orator had received no valuable consideration; and thereupon your orator shows that as a part of the frauds and fraudulent schemes of these defendants—

That no replications were ever filed to put the cause at issue.

That no reference was ever made to a master so as to truly inform the court of the character and amount of the debt.

That the said cause was hurriedly disposed of, without waiting for the three months allowed by the rules of that court in equity.

That no defence was ever undertaken to be interposed at any stage of the proceedings by the said Baker, who pretended to act as solicitor for your orator, but who really acted for Andrew Pierce, R. R. Garrison, C. K. Garrison, Russell Sage, James Seligman, and others, to your orator unknown, in procuring said decree of foreclosure & sale thereunder.

That the trustees, who alone had any right to foreclose the mortgage, never filed any cross-bill or prayed any relief.

32 That the recital of the decree that the cause was heard on "proofs" was wholly false and fraudulent, and there never

was any judicial hearing whatever; that no proofs were ever taken or offered, but that the decree was prepared and entered entirely by consent of and collusively between the complainants and the counsel and officers of the said Pacific Railroad, who were both carrying out the common purpose of procuring the speediest decree of foreclosure, for which the action was originally instituted, and in fraud of the rights and property of your orator, and without any authority from your orator.

That it was false that Garrison, Pierce, and Seligman were the owners of the bonds as recited in the decree, and that the complainants and *the* Baker, counsel for the complainants herein, and the officers of the corporation consenting to said decree, knew of all the facts invalidating such bonds, and wrongfully concealed all such facts from the court.

That no decree was entered in any manner decreeing what
33 debt was due under the mortgage, or ordering the payment thereof, or giving any time or opportunity for redemption; that the said third mortgage bonds neither by their face nor by any provision of said mortgage were due at the time said decree was made, & no interest thereon was unpaid, except the coupons which matured on the first day of November, 1875.

That, well knowing that there was cash in the hands of the receivers appointed by the court in said case, and valuable real estate in the city of St. Louis which could be separately sold, which was far more than sufficient to pay the entire amount of interest justly due on the said mortgage debt, even if valid, the said complainants and the attorney for the Pacific Railroad jointly, and for the purpose of defrauding your petitioner, procured the entry of a decree to sell the entire property of your orator to pay the principal and interest of such bonds.

That the whole amount of said third mortgage bonds were not then or have they ever since been issued, and in any event were not to the full sum of $4,000,000 a lien upon your orator's premises.

34 That at the sale the said James Baker, the director and attorney of your orator, in pursuance of the fraudulent understanding by which said suit was prosecuted and conducted, became the purchaser of the whole corporate property, under the decree which he had assisted in procuring as aforesaid, according to agreement with C. K. Garrison, not for or in the interest of your orator, his clients, but adversely to them, and that he received the sum of $20,000, or some other sum the exact amount of which is to your orator unknown, from the defendant, the Missouri Pacific Railway company, for his services to that company while he owed duty and his best services to your orator, the Pacific Railroad.

(A.) That said premises bought by said Baker upon some secret agreements, the precise terms of which are to your orator unknown, and in trust for the defendant C. K. Garrison and his associates, at the sum of $3,000,000, which sum was payable in said third mortgage bonds; that the purchase was made subject to prior liens

amounting to about $11,791,000. That the sum so bid, paid
35 or agreed to be paid, was purely inadequate, and much less than the actual cash value of the premises.

That C. K. Garrison, one of the complainants in said cause, was the surety upon the bond required to be given by said Baker as purchaser. That during all such legal proceedings the said complainants in said United States circuit court took every advantage furnished them by the neglectful and fraudulent conduct of said Baker and other corporate officers, in refusing to make any defense, and consenting to such irregular, inequitable, oppressive and fraudulent decree and proceedings, as the result of all which said Baker, the attorney and director of the corporation, now claims to have procured the absolute ownership of all its property, and all said confederates and directors combined together with said Baker and Garrison and resisted any intervention or defense to said proceedings by your orator, or by any of its stockholders.

27th. That the said Baker has transferred his interest in
36 said premises to the defendant, the Missouri Pacific Railway company, who have since that time to the present been in the wrongful possession of the earnings, rents, income and profits of the said Pacific Railroad, and have, without law or right, appropriated the same to its own use.

28th. Your orator avers, upon information and belief, that said Missouri Pacific Railway company have little or no cash capital actually paid up, and no cash capital issued to responsible parties, upon whom they can call to pay up. That said Missouri Pacific Railway company was formed and is composed of the holders of said third mortgage ($4,000,000) of bonds which your orator avers was fraudulently issued, and that the holders thereof took them with full notice and knowledge of their fraudulent character. That new bonds were issued by the defendant, the Missouri Pacific Railway company, to the holders of the old third mortgage bonds of the Pacific Railroad in sums corresponding in amount with the said third mortgage bonds; that all accrued interest on
37 said third mortgage bonds, that is to say, from May 1, 1875, to November 1st, 1876, 10½ per cent. was paid by said successor railroad company to the holders of said old third mortgage bonds in cash, and at the same time said third mortgage bondholders were required to take and pay for an equivalent amount of the capital stock of said Missouri Pacific Railway company.

29th. That the principal holders of said third mortgage bonds are and were the defendants C. K. Garrison, Russell Sage, James Seligman, and others of those who confederated together in the procuring said fraudulent and unlawful decree.

30th. That said Missouri Pacific Railway company have, viz., on the first day of November, 1876, without any right to do so, made, executed, and delivered to the National Trust company of the city of New York a mortgage of the property of the Pacific Railroad to secure the payment of a pretended indebtedness of $4,500,000 of

said Missouri Pacific Railroad company, which pretended indebtedness did not exist in fact, but the same is a pretended debt,
38 claimed to have been due to the holders of said fraudulent third mortgage bonds; that said National Trust company becoming insolvent, the Central Trust company, the defendants, by some method to your orator unknown, has been subrogated into the place of said National Trust company, and now claims to have some lien upon your orator's railroad and property hereinbefore described.

31st. Your orator avers that the defendants, the Missouri Pacific Railway company, C. K. Garrison, Russell Sage and James Seligman, or some of them, own, hold and control, or the same are held for their use, nearly the entire amount of said so-called third mortgage bonds, made by the directors of the Pacific Railroad, as above shown, on the 10th day of July, 1875, all of whom took them with full knowledge of the fraudulent representations made of and of the want of authority of the Pacific Railroad to issue them, and of their fraudulent character.

32d. Your orator avers—

1st. That the said pretended mortgage made by the directors of the Pacific Railroad, July 10th, 1875;

2d. The decree of foreclosure obtained by means of said
39 mortgage in said circuit court of the United States, and the subsequent proceedings had under said decree;

3d. The possession of the premises described in said proceedings, known as the Pacific Railroad, by the Missouri Pacific Railway company;

4th. The mortgage made by the Missouri Pacific Railway company of the property of the Pacific Railroad to said National Trust company, November 1st, 1876;

And each and every of them fraudulent, illegal, and improper claims or clouds upon the title of your orator, and that it cannot enjoy the use and benefit of its own property, or sell or dispose of the same while said mortgages or pretended mortgages are outstanding, and while said decree and the proceedings had thereunder are allowed to remain as if good and valid.

33d. Your orator avers upon information and belief that the decree and subsequent sale and proceedings thereunder, in said United States circuit court, and the deed given to Baker in pursuance
40 thereof, were each and all procured by fraud, and are therefore void as against the stockholders of the Pacific Railroad, in this:

(A) That the mortgage was not authorized by the laws of Missouri or by the stockholders of said Pacific Railroad.

(B) That the bonds purporting to be secured by said mortgage were never issued as pretended in said decree. That the debt, if any existed, was greatly enlarged and exaggerated and fraudulently increased.

(C) That the decree embraced and directed to be sold a large amount of property not covered by or embraced in the mortgage or

in the complaint; among other property the railroad known as "The Poplar-street Branch."

(D) That James Baker, the solicitor of the defendant, the Pacific Railroad, was not a competent purchaser of the premises mortgaged as against his clients, the Pacific Railroad or its stockholders. That the law will not allow solicitors of the parties to buy premises sold at judicial sales adversely to the interest of his clients.

(E) That the proceedings under said bill of complaint and decree in said United States circuit court were a fraudulent conspir-
41 acy on the part of the defendants Baker, Garrison, Sage, Seligman, and Pierce, with others to your petitioner unknown, to despoil your orator of its property and franchises.

(F) That said decree and the proceedings thereunder, for other reasons given in other parts of this complaint, is null and void.

34th. Your orator avers and shows that the following indexes of fraud from and on the record in the foreclosure case of Ketchum *vs.* Pacific Railroad et al. are:

(A) The mortgage was made July 16, 1875; the bonds purporting to be secured thereby were dated back to May 1, 1875, and made to carry interest from May 1, so that the first coupon would be due November 1.

(B) The Pacific Railroad was not in default upon any claim whatever against it, except it be upon the fraudulent mortgage sought to be foreclosed. To that time it had paid its interest regularly and also regular dividends upon its stock. The complaint does not aver any default against the Pacific Railroad except the untruth-
42 ful one that its commercial paper had been protested, and that the coupons on the fraudulent mortgage maturing November 1, 1875, were due and unpaid.

(C) The only complainant at the commencement of the suit was George E. Ketchum. He was not sufficiently informed as to what interest he had in the matter, or whether he owned any particular number of bonds, so as to set forth his exact injury, represented by an ownership in the trust property. His averment in the bill of ownership of bonds, showing his interest, or want of interest, is that "he is the holder of many of said bonds." (Record, p. 7.) The decree finds it is averred falsely, and, without any proof whatever on the subject, that the complainant Ketchum owned ten bonds; & complainant avers that said Ketchum did not at the time of filing said bill own any of said bonds.

(*d.*) The decree embraced and directed to be sold property which was not embraced in or covered by the mortgage or the complaint, viz., the railroad known as the "Poplar street."

(*e.*) The final decree did not require the receivers to account,
43 or to apply what money they had on hand, derived from the earnings of the road, to the payment of the debt or of the interest upon mortgage bonds being foreclosed. Had it done so, these defendants, conspirators as aforesaid, would have been defeated. There could have been no sale of the railroad, for the court itself

had at the very time money enough in its hands to pay the interest alleged to be due upon the fraudulent debt, which the court was enforcing against the road; and the principal was not due until 1895.

35th. Your orator avers that the directors refused, on the demand of holders of capital stock to the amount of 10,000 shares, or $1,000,000, to make a motion in the name of the corporation to set aside said decree, and also refused to allow said stockholders to use the name of the corporation to set aside said decree. (Motion to dismiss, p. 47.)

36th. That the directors refused to authorize other counsel to act for the corporation in resisting this great fraud, the foreclosure
44 and sale of the railroad, and that after the stockholders, at an annual meeting, had passed a resolution unanimously requesting the directors, previous to the entry of the decree, viz., March 27, 1876, to employ counsel other than James Baker, to protect the corporation. (Record U. S. Supreme Court, No. 242, p. 5, and motion to dismiss, p. 16.)

37th. That the decree was so worded that none but a holder of these fraudulent bonds could purchase the railroad at the sale.

It provides "that in case said road, &c., shall be purchased by bondholders or for bondholders, then, at any time within sixty days after said sale, any bona fide holder or holders of said third mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers in proportion, &c." (Record U. S. Supreme Court, p. 45.)

The direct effect of which was to deter bidders at said sale. If a person interested in a small amount of the bonds got up a party to buy the road, bid at such sale, and furnished the entire amount of the purchase money, as required by the decree, the purchaser was
45 required, sixty days after the purchase, to accept Garrison, Sage, et al. as co-partners with him in the purchase, and they, owning a majority of the bonds, would control the property; that is to say, if the purchaser owned say $5,000 of said bonds and bought the property at $4,000,000, the whole amount of the mortgage, then, sixty days after he had paid $4,000,000 into court in money, Garrison and Sage et al. would come in with their bonds and reduce the ownership of the purchaser from that of the whole road to becoming an owner of one eighth-hundred part of it, he would temporarily have to furnish the $4,000,000, and would come out at the end of sixty days as the owner of one eight-hundredth part of it.

That there could be no competition at a sale made under such a decree; that the practical effect of it is illustrated in this case. Garrison and Sage, through Baker, bought the road subject to mortgage of $11,791,000 for the sum of $3,000,000. They then mortgaged it for $4,500,000 additional, making a total mortgage of $16,291,000, less $250,000 saved on a compromise of the Carondelet
46 branch road, $16,041,000, and then sold 51 per cent. of it to Gould, subject to $16,041,000 of mortgages, at $3,000,000, which was at the rate of $6,000,000 for the equity.

Or, in other words, assuming their third mortgage bonds to have been worth their full value—more than twice what they gave for them, $4,000,000—the property cost them $15,541,000; and they sold it to a purchaser, who was not tramelled in the choice of associates, by such a decree, at $21,541,000, a profit, omitting the profit made on the bonds and the large income of the road from the account of $6,000,000, on the purchase made from the court.

38th. Your orator avers that the purchase by a mortgage through the interposition of another is a badge of fraud, and the sale is voidable at the instance of the mortgagor. (44 Mo. Rep't, 153 and 163, Throckmorton *vs.* Irwin.)

39th. Agreeable answers were filed on the 5th by Lackland and Durkee, by the Atlantic and Pacific Railroad, the Pacific Railroad, Jannes Baker, &c., &c.; by Clark, who had been dead for more than two months; and on the 6th of June by Fish and Vail, who
47 should have been complainants. The decree was prepared by counsel of C. K. Garrison, and submitted to the court with the erroneous statement that it was all agreed to.

Oaths to all the answers were waived by the complainant.

On the same day Akers and the county of St. Louis withdrew all that was objectionable in their previous cross-bills and answers, and thereupon the decree complained of was entered.

That Garrison wrote a letter to the officers of the county of St. Louis agreeing to pay the county debt, thus inducing the county to withdraw its cross-bill as a stockholder, dated June 1, 1876. (See p. 6 of additional exhibit to reply to motion to dismiss.)

Garrison assumed to pay the counsel of the county of St. Louis the sum of 10,000 or thereabouts, if they would withdraw the answer of the county. Said counsel withdrew said answer, and received his pay from Garrison for so doing.

All seemed to have been content and benefited, except the stockholders of the Pacific Railroad, who were deeply wronged. They were not present, except by their counsel, James Baker,
48 whom they allege to have been unfaithful to his duties and trust. The stock was owned by three hundred to four hundred different persons scattered all over the country, who now at the earliest day they can be heard appear before the court and ask for its judgment upon these transactions.

40th. The decree omitted to find the usual and necessary facts upon which it should be based; it does not find the amount of debt due clearly, if at all, but leaves the same unsettled and undetermined. If it finds the principal and interest of the whole amount of bonds to be due, then its findings are contrary to well-known facts, (the whole $4,000,000 had not then, or have they ever since been issued,) and contrary to the averments of the complaint which avers that the principal of the bonds are not due until 1895, and that but $2,200,000 bonds had been issued; the balance was held in trust by Vail and Fish.

In Missouri a decree must fix the precise sum due, or it is erroneous. (13 Mo., p. 545, Cohen *vs.* Carrol.)

41st. The decree limits no time within which the debt is to
49 be paid, but declares said Pacific Railroad to be at once then and there absolutely debarred and foreclosed, &c. (Record, p. 44.)

Such a decree cannot be sustained, (8 Wal., 318; Clark *vs.* Reyburn.)

42d. The decree omitted to tax cost in favor of the prevailing party; the 983 section of the Revised Statutes of the United States requires cost, disbursements, and allowances to *to* be taxed.

43d. Your orator avers, upon information and belief, that as part of said fraudulent scheme concocted by the defendant's confederates to swindle your orator by getting its railroad, the Atlantic and Pacific Railroad company, by its agents, in 1872, procured the legislature to enact a law authorizing any railroad company to classify its directors into three classes, each class to hold office for three years, which law enabled the directors of your orator's corporation to retain control and management of its affair against the will of its shareholders, and long after the directors had ceased to have any interest as stockholders in your orator's corporation.

50 That from about the time of the enactment of said law to December, 1876, the Atlantic and Pacific Railroad company, by means of said laws, controlled the organization and management of your orator's corporation through its directors of the Pacific Railroad, who were false to their trust, but who were practically placed in their position as directors of the Pacific Railroad by the Atlantic and Pacific Railroad company; said directors did not in any honorable or proper manner represent the interest of the stockholders of the Pacific Railroad, but used their position and influence to denude the Pacific Railroad of its entire property for the benefit of the Atlantic and Pacific Railroad company, and long after they, the said directors of your orator's corporation, had ceased to have any interest, or but a very small interest, in the capital stock of your orator's corporation.

44th. Your orator avers that in 1873, and from that time to 1876, the Atlantic and Pacific Railroad company became embarrassed and unable to pay its debts, and was in 1876 sold by a master, ap-
51 pointed by this court, in foreclosure of some of its numerous debts.

That among others to whom it became indebted, it was in debt to your orator for rent due under the terms of said lease, and for covenants broken therein in a large sum, viz., $7,000,000, which it was unable to pay and never has paid; that to avoid the payment of the same it, with its confederates, fraudulently continued, carried on, and prosecuted to decree the foreclosure suit of Ketchum et al. against your orator.

45th. Your orator avers that at the time said foreclosure suit of Ketchum et al. was commenced the pecuniary interest of the directors of your orator's corporation therein was very small; some of the directors owned no stock, others very trifling amounts; that the stock-

holders of your orator, in writing, requested said directors to resign, that others might be appointed in their place who would properly attend to the duties of their office, which said directors refused to do. The stockholders of your orator also requested said directors to employ counsel other than James Ba-
52 ker to defend the suit of said Ketchum; this also the said directors refused to do; but they allowed said James Baker, who had caused the complaint of Ketchum to be prepared before the cause of action arose, and had also caused the subpœna to be served upon himself, to put in an answer to said complaint admitting the truth of all its material averments, when said directors knew, and said Baker knew, the averments were many of them false in fact, and that the mortgage was made to be foreclosed at once, and thus to take all your orator's property from it.

46th. That from and anterior to the time said Garrison, Seligman and Peirce, were admitted as co-plaintiffs in said suit, which was some months previous to the entry of said decree, said Garrison and Seligman had the entire control and management of the suit brought by said Ketchum.

47th. Your orator avers that although said decree recites that it was entered on its consent, yet it says that it never did consent to the entry of said decree, or authorized any person, attorney, so-
53 licitor or counsel to assent to it in its name or any other manner; that the alleged consent by James Baker was unauthorized and illegal.

48th. Your orator avers that the defendants, C. K. Garrison, Wm. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuels, and Joseph L. Stephens, together with others to your orators unknown, are now or have been, each of them, directors in the defendant corporation, the Missouri Pacific Railway company, and the managers of its affairs, and in the receipt of its earnings and income, and that such of them had knowledge of all of the matters and thing herein complained of, and were parties to said frauds, and knew that said third mortgage was an unauthorized fraudulent mortgage, and that the decree obtained to foreclose the same, was procured by fraud upon the court, and by false representations, and by the unauthorized consent of same James Baker, made to the court as hereinabove set forth, and that the confirmation of the sale was erroneous, for that said Baker was the counsel and solicitor of your orators, and
54 that he was not authorized and could not rightfully buy said premises, or receive from the defendants or either of them the sum of $20,000, or any other amount, for buying his client's property and passing it over to the above-named defendants.

49th. That said defendants last above named, through the agency of the Missouri Pacific company, of which the above-named defendants, and the directors and the principal owners of the capital stock thereof, have wrongfully been in the possession of your orator's property above described since October, 1876, to the present time,

and have collected and received during all that time rents, income, and tolls for the use thereof, for all which your orator avers that the said railway company, and the other defendants named, individually and collectively, owe your orator an account, to be stated by the court, and upon any fixed sum being found to be due to your orators, the said company and the directors thereof individually are indebted to your orators for such sum as the court finds to be due.

55 50th. Your orator avers that by means of false and fraudulent practices hereinbefore recited and perpetrated and imposed upon this honorable court and upon your orator, it has been wrongfully stripped of all its property and franchises, both that which was pretended to be embraced in the mortgage, and that which was not therein embraced; and this court, by said deceit and fraud practiced upon it by the defendants and others, who at present are unknown by your orator, conspiring to this end with the defendants, and who, when discovered, your orator prays for liberty to make defendants hereto, has been, without the court's knowledge, an instrument of great wrong to your orator, and has been deceitfully and fraudulently made to enter such orders and decrees in said Ketchum case, and has wrongfully transferred all of the property and franchises of your orator to the defendant, the Missouri Pacific Railway company, which represents the interest of said defendants and conspirators as aforesaid, consolidated and transferred into said corporation.

56 51st. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, your petitioner humbly prays the court to require the defendants, upon their several and respective corporal oaths, and according to the best and utmost of their several knowledge, information, belief, and remembrance, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereinafter written, they are respectively required to answer, that is to say:

The Missouri Pacific Railway Company are required to answer by the oath of its proper executive and accounting officers:

1st. What, if any, sum of money did you pay to James Baker, esq., or to any person for his use, or for his services in the Ketchum case, above described, or for his services for purchasing and conveying the mortgaged premises, or the premises described in the decree of sale, to you, or for his services in any manner rendered to your company at or about the time the sale of said railroad was confirmed?

57 2d. Was said Baker the same person as is named in the decree as the solicitor or counsel of the Pacific Railroad?

3rd. When and at whose instance was the Poplar-street track, so-called, inserted in the decree? State all the circumstances fully and explicitly. Was it inserted in the decree at the instance or suggestion of your attorn*ies* or any of them? Is or was James O. Brodhead, esq., your attorney? Did he insert it?

4th. What amount of mortgage lien have you put upon the premises known as the Pacific Railroad, described in said decree of sale? How is the debt described in the mortgage evidenced; if by bonds, in what amounts, and to whom and for what purpose were they issued, and how many have been actually issued? State all the circumstances in detail, fully and explicitly. If the payment of any debt purports to be secured by mortgage, state to whom the mortgage is made and who now holds the mortgage?

Who are the present holders of said bonds, so far as known
58 to you, and how many do each of them hold? State as nearly as you can.

5th. What have been your gross monthly and annual earnings since October 6th, 1876, or from the time you took possession of said premises to the time you answer this question, or to the 1st day of the month next preceding your answer, or to the nearest day that you can definitely state the earnings?

What have you done with the earnings of said railroad premises? Answer fully and in detail.

How much have your operating expenses been for the same time, and what items do you include in operating expenses, and what items of expenditure or class of items do you omit from the operating expenses?

What have been your other expenses in and about the premises, crediting all old materials and supplies sold or exchanged by you?

Do you include taxes as operating expenses? What do they amount to, and under what head do you include them?

6th. How much capital stock have you issued and to whom? Who are your present stockholders, and how many shares
59 does each one own? For what consideration and to whom was it originally issued? If you say it was issued for money, what was done with the money received for the stock, or about an equivalent sum of money, at that time, or about that time?

Did you not pay any money to the old third mortgage bondholders of the Pacific Railroad, and how much, to whom, and what for?

7th. Was or not your corporation organized by the above-named third mortgage bondholders and by whom? Who were its first directors and officers? Who are its present directors and officers?

8th. Have you any property or income except such as you derive or have heretofore derived from said Pacific Railroad, and, if so, what is it, and where is it, and what is its value?

52d. Cornelius K. Garrison is required to answer under oath:

1st. Did you directly or indirectly purchase the premises known as the Pacific Railroad at the master's sale, or from any one who did purchase at the master's sale, and if so, from whom did you purchase it?

60 2d. Were you one of a party or of a number of persons who did purchase said railroad at any time, and of whom and when was it purchased by you or your associates?

3d. If you say you purchased said railroad from James Baker, or was one of a number who did so purchase it, what consideration did you or those with whom or for whom you acted pay to said Baker?

4th. Did you, with or without others, or did any person for you, assume the bid made by said Baker for said premises at said master's sale? If you assume his bid made at said sale, how did you pay for the same? If you paid in bonds, how many bonds did you or your associates use for that purpose; did you give security to the court that Baker's bid should be complied with?

5th. Who was interested with you in any purchase made by you from said Baker or from said master; name each of them, and what interest did each person have?

6th. Did you organize the Missouri Pacific Railway company, or take any part therein; and, if so, what part?

61 7th. Were you a director and president of said Missouri Pacific Railway company, and when did your office begin and when did it terminate, and what interest did you have in said company? How many bonds, and of what kind, and how much stock? For what consideration did you receive the bonds and stock; what did you give for each? If you say you paid any money for the stock, state in full, with all the particulars, regarding your transactions with the stock and bonds?

8th. If you paid for said premises with any part of the third mortgage bonds of the Pacific Railroad, state particularly how many and at what price; also state fully where you got said third mortgage bonds; if you bought any of them, state from whom you purchased them, giving the name and price you paid and the exact time when you bought them; and whether or not you bought in connection with said bonds any note, draft, or debt obligation of the Atlantic and Pacific Railroad company, or of the Pacific Railroad; if so, what did you buy? Please attach to your answer copies of any

62 evidence of debt bought by you with, at, or about the same time you bought said bonds; let the copies attached contain all the names that are on the paper, either on its face or on its back.

9th. Were you not present at a meeting of the stockholders of the Pacific Railroad, held in November, 1875, and again in December, 1875, at the Drexel building in the city of New York, and did you not hear the speech of F. J. Bowman, which was subsequently printed, in and by which the said third mortgage bonds were denounced as fraudulent and void, and evidence quoted showing said bonds to be so, and at which meeting a committee was appointed to look after the interests of the stockholders?

10th. Did you buy any of said bonds for others than yourself; if so, for whom? Or on joint account with any one; if so, for whom? Give all the particulars fully.

11th. Were you, or was your son, or either of your brothers, a director at any time, if so, when, of the Atlantic and Pacific Railroad company?

12th. Were you a creditor, and when, and for what amount, of

4th. What amount of mortgage lien have you put upon the premises known as the Pacific Railroad, described in said decree of sale? How is the debt described in the mortgage evidenced; if by bonds, in what amounts, and to whom and for what purpose were they issued, and how many have been actually issued? State all the circumstances in detail, fully and explicitly. If the payment of any debt purports to be secured by mortgage, state to whom the mortgage is made and who now holds the mortgage?

Who are the present holders of said bonds, so far as known
58 to you, and how many do each of them hold? State as nearly as you can.

5th. What have been your gross monthly and annual earnings since October 6th, 1876, or from the time you took possession of said premises to the time you answer this question, or to the 1st day of the month next preceding your answer, or to the nearest day that you can definitely state the earnings?

What have you done with the earnings of said railroad premises? Answer fully and in detail.

How much have your operating expenses been for the same time, and what items do you include in operating expenses, and what items of expenditure or class of items do you omit from the operating expenses?

What have been your other expenses in and about the premises, crediting all old materials and supplies sold or exchanged by you?

Do you include taxes as operating expenses? What do they amount to, and under what head do you include them?

6th. How much capital stock have you issued and to whom? Who are your present stockholders, and how many shares
59 does each one own? For what consideration and to whom was it originally issued? If you say it was issued for money, what was done with the money received for the stock, or about an equivalent sum of money, at that time, or about that time?

Did you not pay any money to the old third mortgage bondholders of the Pacific Railroad, and how much, to whom, and what for?

7th. Was or not your corporation organized by the above-named third mortgage bondholders and by whom? Who were its first directors and officers? Who are its present directors and officers?

8th. Have you any property or income except such as you derive or have heretofore derived from said Pacific Railroad, and, if so, what is it, and where is it, and what is its value?

52d. Cornelius K. Garrison is required to answer under oath:

1st. Did you directly or indirectly purchase the premises known as the Pacific Railroad at the master's sale, or from any one who did purchase at the master's sale, and if so, from whom did you purchase it?

60 2d. Were you one of a party or of a number of persons who did purchase said railroad at any time, and of whom and when was it purchased by you or your associates?

3d. If you say you purchased said railroad from James Baker, or was one of a number who did so purchase it, what consideration did you or those with whom or for whom you acted pay to said Baker?

4th. Did you, with or without others, or did any person for you, assume the bid made by said Baker for said premises at said master's sale? If you assume his bid made at said sale, how did you pay for the same? If you paid in bonds, how many bonds did you or your associates use for that purpose; did you give security to the court that Baker's bid should be complied with?

5th. Who was interested with you in any purchase made by you from said Baker or from said master; name each of them, and what interest did each person have?

6th. Did you organize the Missouri Pacific Railway company, or take any part therein; and, if so, what part?

61 7th. Were you a director and president of said Missouri Pacific Railway company, and when did your office begin and when did it terminate, and what interest did you have in said company? How many bonds, and of what kind, and how much stock? For what consideration did you receive the bonds and stock; what did you give for each? If you say you paid any money for the stock, state in full, with all the particulars, regarding your transactions with the stock and bonds?

8th. If you paid for said premises with any part of the third mortgage bonds of the Pacific Railroad, state particularly how many and at what price; also state fully where you got said third mortgage bonds; if you bought any of them, state from whom you purchased them, giving the name and price you paid and the exact time when you bought them; and whether or not you bought in connection with said bonds any note, draft, or debt obligation of the Atlantic and Pacific Railroad company, or of the Pacific Railroad; if so, what did you buy? Please attach to your answer copies of any

62 evidence of debt bought by you with, at, or about the same time you bought said bonds; let the copies attached contain all the names that are on the paper, either on its face or on its back.

9th. Were you not present at a meeting of the stockholders of the Pacific Railroad, held in November, 1875, and again in December, 1875, at the Drexel building in the city of New York, and did you not hear the speech of F. J. Bowman, which was subsequently printed, in and by which the said third mortgage bonds were denounced as fraudulent and void, and evidence quoted showing said bonds to be so, and at which meeting a committee was appointed to look after the interests of the stockholders?

10th. Did you buy any of said bonds for others than yourself; if so, for whom? Or on joint account with any one; if so, for whom? Give all the particulars fully.

11th. Were you, or was your son, or either of your brothers, a director at any time, if so, when, of the Atlantic and Pacific Railroad company?

12th. Were you a creditor, and when, and for what amount, of

said Atlantic and Pacific Railroad company, and what, if any,
63 security did you have for the payment of any credit you may have given to it?

13th. Were either of your brothers creditors, directly or indirectly, by way of indorsement or otherwise, of said Atlantic and Pacific Railroad company, and to what amount? State as near as you can, and what security either of them had for the payment of any credit given by them? State fully all you know on the subject.

14th. Was your son, William R. Garrison, a creditor, or otherwise interested in said Atlantic and Pacific Railroad company; if so, how and to what amount?

15th. Do you know, or have you ever known the defendants Jay Gould and Russell Sage, or either of them?

16th. Was Russell Sage interested with you in the purchase of said Pacific Railroad premises, either jointly or severally, or had he a joint interest in the venture with you?

17th. How many of said third mortgage bonds had Russell Sage? Did you represent and act for him on the negotiation had with James Baker? Did you and Sage, with or without Baker, at said
64 Sage's, in the city of New York or elsewhere, have any conference before the sale of said premises, or afterwards, relative to the purchase of said premises? If so, was it before or after, and what took place thereat; did you and Sage come to an understanding to buy said premises at the master's sale, or any other time, for your own account, or for the account of yourselves and other third mortgage bondholders, excluding the stockholders from participating therein?

18th. From the time the court allowed you to intervene in the Ketchum suit, did not you have the entire management of it through and by your counsel?

19th. Was, or not, Russell Sage familiar and privy to all or nearly all your doings in respect to said suit; to the purchase of said premises; to the agreement which you made with certain stockholders relative to the organization of said Missouri Pacific Railroad; to the payment of said James Baker; to the issue of stock; and whatever stocks and bonds said railway company has issued; was not said Russell Sage a director in said railway company from its or-
65 ganization to the present time, and if not, to what time was he director? Did, or not, you communicate freely with him on the above subjects?

20th. How many of said third mortgage bonds did Sage own; and how many did you represent for him?

21st. Did you, or not, have several and frequent conferences with Mr. Sage before the sale of said premises? Did not you and Sage, before the sale, informally agree and understand that James Baker, or some person other than yourself, was to buy said railroad? Did, or not, Sage entrust a part of his third mortgage bonds to you, and a part to one D. R. Mangum, and did you not have or order on Man-

gum or some other authority by which you could control all of Sage's bond, although apparently represented by said Mangum?

22d. Will you state fully in detail and at length all agreements and understandings, written or verbal, between yourself and Andrew Pierce, D. R. Harrison, Russell Sage, and also with James Baker, not hereinabove stated by you, in relation to said third mortgage bonds to
66 the release of Pierce and D. R. Garrison from the endorsement to the stockholders of the Pacific Railroad, to the buying of said railroad premises, to the payment of James Baker, to the organization of the Missouri Pacific Railway company, to the issue of shares and bonds of said railway company, and how and in what manner the same was to be paid?

23d. Do you know the defendant, Jay Gould? Have you ever sold him any shares of the Missouri Pacific Railway company? How many, and at what price? Did you or not at the time or previous to making any sale to him, inform him of the pendency of any suits or litigated questions pending in the courts involving the title to said Missouri Pacific Railway company to said railroad premises, or to any part of them?

24th. Do you or not know whether Russell Sage, or any other person, informed said Gould of any proceedings pending in court regarding the title of said Missouri Pacific Railway company to said railroad premises, at about the time or before your making a sale of stock to said Gould?
67 Did Gould, so far as known or believed by you, have any knowledge of said adverse claims or litigation; if so, what?

25th. Did you or not come in possession of $750,000 or any other amount of the bonds of the Atlantic and Pacific Railroad company, called equipment bonds, belonging to the Pacific Railroad, and if so, how did you get them and what title had you to them, and what have you done with them? Do you now hold them; if not, to whom have you given them? Do you or not know anything of said bonds or any part of them? Did they or not once belong to the Pacific Railroad? State all you know relating to said bonds, fully and in detail.

53d. Jay Gould is required to answer under oath:

1st. What office or position do you now or have you ever held in the Missouri Pacific Railway company? Who are the present directors of such railway company, and who have been the directors thereof since its organization in 1876?

2d. What is the gross and what the net monthly and annual
68 income of said railroad and revenue since October 6th, 1876, to this time? State it with annual *rest*. What items do you embrace in the operating expenses, and what items of disbursement do you exclude therefrom?

3d. Have you in your possession or in the possession of the Missouri Pacific Railway company, or any of its officers, attorneys, or agents, any of the equipment bonds of the Atlantic and Pacific Rail-

road company, the whole or a part of which are described in this complaint, and if so, how many; and what title have you or has the Missouri Pacific Railway company to them, or to any part of them?

4th. Did the defendants, C. K. Garrison or Russell Sage, or any other firm, ever communicate to you, before you purchased any stock of said Missouri Pacific Railway company from said Garrison, that there was any litigation pending affecting or regarding the title or the value of said railroad premises? What did you know or what had you been told before said purchase of stock regarding
69 said litigation by said Sage or by any one else? State at length all that Sage or Garrison told you, and all that you know relating to any suits or litigations regarding the title or the possession of said railroad premises?

5th. Was Russell Sage, Solon Humphreys, Cyrus W. Field, Sidney Dillon, F. L. Ames, all or either of them, interested, directly or indirectly, in the stock of the Missouri Pacific Railway company bought by you from C. K. Garrison? Did either of them lend you money with which to make said purchase, or any part of it, or for any other purpose, about that time, and if so, who and what amount, and do they hold the stock as collateral security for the repayment of said loans?

6th. If you say that all or either of them are interested in said stock, do you expect, or have you any agreement, written or verbal, express or implied, that all or either of the above named are at some future time to take a portion of said stock off from you; if so, which of them and to what amount or number of shares, and what agreement did you have?

70 54th. Russell Sage is required to answer under oath:

1st. Are you a director, and how long have you been so, in the Missouri Pacific Railway company?

2d. Are you a stockholder therein and to what number of shares, and how did you come by the same? Were you an original subscriber? State what you paid for the same and from whom you received it, and whether or not you at or about the same time received a payment of money annually or really as interest, or interest in arrears on the third mortgage bond of the Pacific Railroad (of Missouri)?

3d. Are you a holder of the bonds of the Missouri Pacific Railway company; and how many in number and in dollars do you hold, and how and in what manner did you receive them? What price did you pay for said bonds? Did you at the same time, and as a part of the same transaction, *by* any evidences of debt against the Atlantic and Pacific Railroad company, or the Pacific Railroad, or Andrew Pierce and D. R. Garrison, or any or either of them;
71 if so, what did you do with such evidences of debt?

If you paid by giving an equivalent or any other amount of the third mortgage bonds of the Pacific Railroad, state from whom you procured said third mortgage bonds, and what sum of money you gave therefor, and to whom?

4th. Do you know the defendant C. K. Garrison; had you any of said third mortgage bonds jointly or on joint account with said Garrison; or did you, or any bank in which you are an officer, hold any of said third mortgage bonds as collateral security for any sum of money loaned; if so, how many bonds were there, and what sum was loaned upon them to said Garrison or to his use?

5th. Did you have any conversation with said Garrison about the sale of said railroad premises at or about the time of his (Garrison) going to St. Louis to buy the railroad at the master's sale in September, 1876, or in August preceding?

Did you at that time, or any time, come to an understanding or agreement with him that he (Garrison) should not himself
72 directly buy the railroad from said master, but that he should cause it to be bid in by some other party or person; if so, when? Was the person agreed upon between you James Baker?

Did you, in pursuance of said understanding, authorize D. R Mangum, or any other person, to represent your bonds at said sale?

Did said Mangum represent you, or your bonds, or any part of them, at said sale, and what part; how many?

Did you authorize Garrison to represent your bonds at said sale in whole or in part, and in what manner and form did you authorize Garrison to act for you in relation to the purchase of said railroad premises, and the organization of a successor railroad company? State all the particulars and details fully.

6th. Did or not you say to any one the morning of the master's sale, before it had taken place, or the day before, that Garrison would not buy the railroad, but another person would; if so, to whom did you say it?

73 7th. Did you loan any money or agree to loan any money to Garrison, or to any one else, to aid in purchasing said railroad premises at said master's sale, or at any other time, and to whom?

8th. Do you know Jay Gould; have you had any conversation with him relative to any suits pending or litigation regarding the title of the Missouri Pacific Railway to the railroad known as the Pacific Railroad; if so, when was it?

Had you any such conversation with him at the time and just before he bought Garrison's stock?

Did you have a negotiation with Garrison for the purchase of said stock; if so, who was interested with you; for whom were you to purchase it?

Did Gould, subsequent to your negotiation with Garrison, purchase said stock, and for whom did he purchase it; were you or are you pecuniarily interested in the purchase of said Garrison's stock by Gould, and to what extent and in what manner?

Did you, about the time Gould purchased said stock, loan
74 Gould any money, taking portion of said stock as collateral security for the repayment of the loan; and if so, how much money did you loan, and how much stock did you take as collateral;

is there any understanding on your part that you have the right or option to take said stock and cancel the loan?

9th. Did or not you tell Gould there were proceedings pending in the courts affecting the title to said railway premises before he purchased said stock of said Garrison, or anything to that effect, or have any conversation with Gould on that subject?

10th. Were not yourself, Solon Humphrey, Cyrus W. Field, Sidney Dillon, and F. L. Ames, or some of them, interested or to be interested with said Gould in said purchase of stock from said Garrison?

11th. Were you or not quite familiar with the defense to the foreclosure suit of Ketchum *vs.* Pacific Railroad?

Did you not have a conversation with Frank J. Bowman, esq., on that subject in November or December, 1875, at 25 William street, in the city of New York, and did not said Bowman then and
75 there tell you what the defense was to said suit?

Did he not then and there give you a printed speech he had just made at a meeting of the stockholders of said Pacific Railroad, held in the Drexel building, on Bond street?

Was it not claimed to you by said Bowman then and there that said third mortgage bonds were invalid and void? Had you any of said third mortgage bonds at that time?

Did you not acquire your interest in them after your conversation with said Bowman and after December 1st, 1875?

55th. William R. Garrison, Oliver Garrison, D. R. Garrison are each required to answer for himself under oath:

1st. Were you or either of you connected with the Atlantic and Pacific Railroad company as officers, directors, creditors, bondholders, or stockholders? If so, state particularly how you were connected with it and to what extent.

2d. Were you or either of you connected with the Pacific Railroad, the complainant hereinbefore, or at the time of the entry of the decree hereinbefore described, as directors, officers, bond-
76 holders, stockholders, or creditors? If so, state how and in what manner you were connected, when your connection commenced, and when it ceased.

3d. Did you or either of you employ or suggest that said James Baker buy the road at the U. S. master's sale; did you or either of you know that he was employed to do so; how was said Baker paid for doing so, by whom, and what sum?

4th. Did you or *or* either of you know, or have any knowledge, that said Baker was to buy the road; if so, did you know it before the sale or bidding; who told you?

If C. K. Garrison told you, or his attorney told you, state fully when he told you, and all the particulars derived from said C. K. Garrison, or from his attorney.

Was James Baker paid from the earnings of said railroad or other-

wise the sum of $20,000, or any other amount, and for what consideration was he paid that sum, or any other?

5th. Are you or either of you now, or have you been,
77 been, directors or officers of the Missouri Pacific Railway company; if so, at what time or times and when did your connections with it terminate?

6th. What have been the gross monthly or annual earnings of the Missouri Pacific Railway company since September, 1876, and what has been done with them; state the facts, as far as you know them, fully and in detail?

7th. Did the Missouri Pacific Railway company, or any of its officers, at any time, come into the possession of any of the equipment bonds issued by the Atlantic and Pacific Railroad company, at one time owned by complainant, the Pacific Railroad; if so, how many, in dollars, were there, and what became of them?

56th. George J. Forrest, Webb M. Samuels, and Joseph L. Stephens are each required to answer for himself under oath:

1st. Are you, or either of you, directors or officers of the Missouri Pacific Railway company; how long have you been so, and when did your term of service commence and when did it
78 terminate?

2d. What have been the gross monthly or annual earnings of the Missouri Pacific Railway company since September, 1876; what has been done with said earnings; state the facts as far as you know them fully and in detail; was James Baker paid the sum of $20,000, or any other sum, by said railway company, and for what reasons?

3d. Do you know when said Baker was employed to buy said railroad, and by whom; state fully and in detail all you know on the subject and all that C. K. Garrison, Russell Sage, or any of his or their attorneys, have told you on that subject?

57th. Henry F. Vail and James D. Fish, trustees, are each required to answer for himself under oath:

1st. Are you the individuals named as trustees in the third mortgage, above described?

2d. Did you or either of you have any interest in the purchase of the mortgaged premises at the master's sale?

3d. What sum of money did you or either of you receive for your services in the Ketchum suit?

79 4th. Were you or either of you the holders of any of said third mortgage bonds at any time, or was any corporation, of which either of you are or were cashier or president, the owner of any of said bonds; if so, what price did you pay for them; of whom were they obtained; state in detail all the partiulars?

5th. How many bonds, that is, what amount of bonds, were issued under said mortgage, and when and to whom were they issued or delivered by you or either of you?

6th. Did you or do you, or either of you, hold any of the so-called improvement bonds and income bonds made by the Pacific railroad; if so, what amount did or do you hold, and in what capacity did or do you hold them, and from whom and for what purpose did you receive them?

7th. Were either of you an officer, director, stock- or bondholder in the Atlantic and Pacific Railroad company; if so, which of you, and when, were you officer or director, and to what extent was you interested as stock- or bondholder?

80 8th. Did you or either of you, or did any corporation of which you are officers or members, sell any of said third mortgage bonds after the suit of foreclosure was brought, and if so, how many, to whom, and at what price? Did you sell any evidence of debt with said bonds? Did you hold any evidence of debt made by the Atlantic and Pacific Railroad company; if so, what did you do with it?

58th. The Central Trust company is required to answer, under the oath of its president or other executive officer:

1st. What claim, if any, have you upon the premises above and herein described; how did you come by it, and at whose solicitation; state the details fully; if your claims are secured by mortgage state how many in amount of bonds are issued under said mortgage, and to whom they were issued, and so far as known to you who are the the present holders thereof?

59th. George E. Ketchum is required to answer:

81 1st. Were you the complainant in the foreclosure suit against the Pacific railroad; at whose solicitation did you become so; how many in amount of bonds did you own at the time the suit was commenced; how many at the time the decree was entered; what did they cost you; from whom did you obtain them; what have you now to represent them; did James Baker or any of his associate attorneys or agents of the Atlantic and Pacific railroad solicit you to become complainant in the suit commenced by you hereinbefore described; were you interested in the Atlantic and Pacific railroad as a creditor, bondholder, or stockholder, and how much and to what extent?

2d. Where did you reside and where was your place of business, office, store, or headquarters at the time said suit was commenced; where during its pendency, and where now?

3d. What business were you engaged in at the time of the commencement of the suit, and what business are you now engaged in?

82 60th. Thomas and James Seligman are each required to answer under oath:

1st. Were you complainants in the foreclosure suit of Ketchum, Garrison, Seligman, and Pierce against the Pacific railroad? Were

you, or either of you, at the time you became parties to the suit the owners or holders of any of said third mortgage bonds; how long did you hold them; and what amount did you, or either of you, then own in your own right or otherwise? Did you own said bonds absolutely in your own right, and were they in your possession; if not, who had them? State all the particulars fully.

2d. Were you, or either of you, interested in the purchase of said railroad by said James Baker; and how, in what manner, and to what extent? If you say you were, state fully how you were interested and whether or not you had any money with which to pay for said bid made by Baker, and how much money had each of you set apart or raised for that purpose, or had you any resources upon which you could or intended to draw for the money required
83 except by or through C. K. Garrison or his associates?

3d. Did you, or either of you, sell out your interest in that road or in the bid made by Baker to C. K. Garrison, Russell Sage, or either or both of them; if so, what did you sell, to whom did you sell, and at what price did you sell?

4th. Did you, Thomas W. Pierce, at the time you were made a party to said suit, own or have in your possession a single one of said third mortgage bonds; if so, state from whom you obtained said bond or bonds, and what price you paid therefor, and how you held it?

5th. Were you made a party to said suit with your own personal knowledge or approbation? Who did you authorize to make you one of the complainants in said suit?

6th. Did you, James Seligman, at the time you were made a party to said suit own or possess in your own right a single one of said third mortgage bonds; if so, state the number of the bonds
84 you owned and from whom and at what price you obtained them?

61st. Wherefore your orator humbly prays this honorable court:

1st. Upon finding the facts to be true as alleged, concerning the income bonds, the improvement bonds, and the third mortgage bonds, so called, that you will order the bonds upon such terms, and under suitable penalties as to equity appertains, to be brought into court and declared void and canceled; that you will order said trustees, Henry F. Vail and James D. Fish, to bring into court, that the same may be declared void, and to cancel the instruments or deeds of trust under which they act, viz: the deed described in said bill of complaint as being claimed to have been made by the said Pacific Railroad company, dated December 16, 1874, to secure the payment of $2,000,000 of so-called improvement bonds; also, the one dated July 10, 1875, to secure the payment of $4,000,000 of so-called third mortgage bonds, and all bonds owned or controlled by them, purporting to be secured by said deeds or instruments of trust, or
85 either of them, that the same may be declared void and canceled, and for nothing had.

2d. That the defendant, the Central Trust company, be required

to bring into court said mortgage, made November 1, 1876, and all other liens which it has or claims to have upon the premises in the complaint described, and cancel the same, and that said mortgage and liens be declared void and of no binding effect upon the property of your orator.

3d. That upon finding the facts to be true as alleged, you will order and decree that said decree of foreclosure be set aside and declared fraudulent and void.

4th. That you will direct an account to be taken of what, if anything, is now due to said Vail and Fish, trustees, or to said Ketchum, C. K. Garrison, James Seligman, and Thomas W. Pierce, complainants in said foreclosure suit, or to any other of the defendants in the suit, for principal or interest upon said mortgage or upon the bonds purporting to be secured thereby, and that an account may
86 also be taken of the rent, income, and profits, earnings, receipts, and necessary and reasonable expenditures in operating said mortgaged premises derived from, in, about, or by reason of said mortgaged premises, which have, or without the neglect, bad management or default of the defendants, or the diversion or traffic and business from your orator's property by the defendants, or by some of them, might have been received by and from the premises so as hereinbefore described, obtained, and detained from your orator; and if the same shall appear to have been more than the principal and interest due from your orators, then that you will order and decree that the same be paid over to your orator. And in the event of the Missouri Pacific Railway company not being able or willing to pay said balance, so found to be due to your orator, then that the defendants, named as directors of said corporation, be individually ordered to pay the same.

5th. That your orator may be allowed to redeem said prem-
87 ises claimed to be embraced in said mortgage on payment of the principal and interest, if any there be, remaining due on said bonds or mortgages so claimed to have been foreclosed.

6th. That the Missouri Pacific Railroad company, its managers, directors, trustees, and successors in the possession of said premises, may be ordered and directed to deliver up possession of said mortgaged premises, free from all liens and incumbrances, and all title, deeds, and writing relating thereto, to your orator, or to its appointee.

7th. That the court will appoint its receiver for said premises, the Pacific Railroad, to take possession of the entire property in controversy, pending this litigation, to care for and operate and manage said railroad, with all the usual powers of a receiver appointed by courts of equity, under the directions of this court.

8th. That you will allow your orator, whenever it is able, to
88 learn who the other persons are who confederated and combined with the defendants herein named, as above set forth, to make the same parties defendants hereto, and to require them, when so found, to make answer to his bill of complaint.

9th. Or that the court will grant to your orator such other further or different relief as to equity and good conscience appertains.

10th. That this court will issue its subpœna and other, if any there be, proper process to make all the persons herein named as defendants parties hereto, viz:

The Missouri Pacific Railway company, Cornelius K. Garrison, Russell Sage, Jay Gould, Wm. R. Garrison, Oliver Garrison, D. R. Garrison, George J. Forrest, John L. Stephens, Webb M. Samuels, George E Ketchum, Thomas W. Pierce, James Seligman, James Baker, Henry F. Vail, and James D. Fish, commanding them to appear and show cause, if any they have, why the prayer of the foregoing bill of complaint should not be granted; and your orator as in duty bound will ever pray.

PACIFIC RAILROAD,
89 By PETER MARIE,
Vice-President.

GLOVER & SHIPLEY,
Solicitors for the Complainants.

STATE OF NEW YORK, }
City and county of New York, } *ss.*

On this 22d day of June, 1880, personally appeared before me the subscriber, Peter Marie, who made oath that he is the vice-president of the Pacific Railroad, the complainant herein; that he has read the foregoing bill of complaint, and that the averments in the same are true to the best of his knowledge, information, and belief.

PETER MARIE.

Sworn to before me the day and year above written.
[SEAL.] W. D. SEARLES, 2D,
New York county.

90 *Exhibit "A."*

Copy of the complaint of George E. Ketchum *vs.* Pacific Railroad and others.

George E. Ketchum, complainant, }
vs. } In Equity. No. 703.
Pacific Railroad et al., defendants. }

Now comes the complainant by his solicitors, Messrs. Sharp & Broadhead, and his bill of complaint herein against the said defendants, and on motion of said solicitors it is ordered that subpœnas in chancery be issued against the said defendants, returnable to rules the first Monday, the 3d day of January, 1876.

And the said bill of complaint, so filed as aforesaid, in words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri.—In equity.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, in the eight circuit, sitting in equity.

91 Humbly complaining, shows unto your honors, your orator, George E. Ketchum, a citizen of the state of New York, who brings this bill of complaint against the Pacific Railroad, a corporation created under and by virtue of the laws of the state of Missouri, against the Atlantic & Pacific Railroad company, a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned, engaged in operating and maintaining a railroad in the state of Missouri aforesaid, and against James Baker, Rufus J. Lackland and Dwight Durkee, citizens of the state of Missouri, and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the state of New York.

And thereupon your orator complains and alleges that the said Atlantic & Pacific Railroad company was and is a corporation created in manner aforesaid, and by the aforesaid act of Con-
92 gress authorized and empowered to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States.

Your orator further complains and alleges, first, that the said Pacific Railroad, defendant herein, made and delivered to the defendants, Uriel A. Murdock, James Punnett, and Luther C. Clark, a mortgage, or deed of trust, dated July 15th, 1868, which said Pacific Railroad conveyed and mortgaged to said Murdock, Punnett, and Clark all and singular of the entire line of the Pacific Railroad, two hundred and eighty-three miles in length, extending from the depot at Fourteenth street, in the city of St. Louis, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Cooper, Pittis, Johnson, Cass, and Jackson, in the state of Missouri, and ending at the western boundary of said state of Missouri at Kansas City, with its appurtenances, including the depots, stations, machine shops, rolling stock, machinery, rights, interests, and franchises of the said railroad, as trustees, and in trust to secure the payment of the series of seven thousand bonds mentioned in said
93 mortgage, severally dated the first day of August, 1868, for the sum of one thousand dollars each, payable twenty years after date to bearer, in gold coin of the United States of America, at the Bank of America, in the city of New York, and interest thereon, at the rate of six per cent. per annum, payable semi-annually in gold coin upon the presentation of coupons thereunto annexed; and which said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds secured thereby for ninety days after the same became due and payable and

demand therefor made, or if the principal sum of any of said bonds when and as the same became due and payable should not be paid for the period of ninety days after demand made therefor, said mortgagees or trustees were authorized and required, upon the written request of the holder of any bond the principal or interest of which should be in arrear or unpaid, to sell the said railroad and property, interest, rights, and franchises thereby mortgaged, at public
94 auction, at the court-house in the city of St. Louis, first giving ninety days' notice thereof, and of the time, place, and terms of sale, by notice specified in said mortgage; and on such sale to execute and deliver conveyance, to transfer and convey said property and all the interest of said mortgagors therein, to the purchaser or purchasers thereof, who were thereby authorized to enter upon and take possession of the same; and in such case said trustees were directed to apply the proceeds of said sale pro rata among the holders of all bonds secured by said mortgage.

Your orator further shows unto your honors that the whole amount of seven million dollars of bonds, mentioned in and secured by said mortgage, were executed, issued, and negotiated by said company, and are now outstanding, and that the interest has been duly and regularly paid upon said bonds, and that no interest is due thereon, nor will any mature until February 1st, 1876; and that said mortgage is a first lien upon the property thereby mortgaged.

Second. Your orator further shows unto your honors that said Pacific Railroad made and delivered to the defendants Edwin
95 D. Morgan and Joseph Seligman a mortgage or deed of trust, dated July 1st, 1871, by which said Pacific Railroad conveyed and mortgaged to the said Morgan and Seligman the same property mentioned and described in the preceding mortgage to Murdock, Punnett and Clark, and subject to the lien of said last-mentioned mortgage, as trustees, and in trust to secure the payment of an issue of three thousand bonds mentioned in the said mortgage, severally dated July 1st, 1871, for the sum of one thousand dollars each, payable twenty years after date, in lawful money of the United States, to the holders of said bonds, at the National Bank of Commerce, in the city of New York, and interest thereon at the rate of seven per cent. per annum, payable semi annually, in like lawful money on the presentation of coupons thereunto annexed, and which said mortgage contained a clause similar in all respects to that mentioned in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the
96 bonds secured thereby, in case of default for ninety days in the payment of the principal or interest after demand, or in case of failure to pay said trustees an annual sum of fifty thousand dollars, thereby agreed to be paid to reduce said mortgage, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference or priority.

That the whole amount of said bonds mentioned in said mortgage was executed, issued, and negotiated by said company, and that un-

der a clause in said mortgage providing for a sinking fund, one hundred and ninety-six thousand of the bonds secured thereby have been redeemed and cancelled, and that the residue of the entire issue of said bonds secured by said mortgage, amounting to two million eight hundred and four thousand dollars, are now outstanding and unpaid, and that the interest has been duly and regularly paid upon all the bonds outstanding, and that no interest will mature thereon until January 1st, 1876, and that said mortgage
97 is a second lien upon the said property.

Third. That the said Pacific Railroad made and delivered to the defendants, Rufus J. Lackland and Dwight Durkee, a mortgage or deed of trust, dated April 19th, 1872, by which said Pacific Railroad conveyed and mortgaged to the said Lackland and Durkee certain real estate in the city of St. Louis, state of Missouri, in said mortgage described as follows:

Four blocks of ground in the city of St. Louis, being city lots numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street; also block number two hundred and thirteen, in the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-
98 six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also the following-described real estate in the city block number four hundred and thirty-eight, viz.:

Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block, thence west along the north side of Cerré street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet six inches to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also the following, viz.: Commencing on the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerré street; thence west one hundred and fifty-two
99 feet six inches to Twelfth street, the place of beginning.

Also, the following-described tract or parcel of land, viz.: commencing at the northwest corner of city block number four hundred and thirty-nine, the southwest corner of Twelfth and Cerre streets; thence south one hundred and twenty-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block

439; thence along the south line of Cerre street, to the place of beginning; as trustees and in trust, to secure the payment of an issue of bonds amounting in the aggregate to eight hundred thousand dollars, each dated May 1st, 1872, payable twenty years after date, in lawful money of the United States, to bearer, at the National Bank of Commerce in the city of New York, with interest thereon, at the rate of eight per cent. per annum, payable semi-annually, in like lawful money, on the presentation of certain coupons annexed to said bonds; of which said bonds, six hundred were for the sum of one thousand dollars each, and four hundred for the sum of
100 five hundred dollars each; and which mortgage contained a clause similar to that contained in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default of ninety days in the payment of the principal or interest, after demand, to sell and convey the premises therein mentioned for the benefit of all the bonds secured thereby, without preference or priority; and that the whole amount of said bonds were executed, issued, and negotiated by said company, and are now outstanding, and that said mortgage is a first lien on the real estate therein mentioned.

Fourth. Your orator further shows unto your honors, that subsequent to the execution and delivery of the aforementioned mortgages, the said Pacific Railroad constructed a branch railroad connecting with and intersecting its main line at or near Kirkwood, about thirteen miles west from the city of St. Louis, and extending from the point of such intersection to the Mississippi river at Carondelet,
101 now known as South St. Louis, in the state of Missouri aforesaid; and also constructed in connection with said branch railroad side tracks running to and connecting with furnaces built on the line of the railroad at Carondelet aforesaid; and also erected on said branch road depots, engine houses, and water stations, and also a depot at Carondelet aforesaid; and also purchased and acquired the title to various parcels of real estate on the line of said branch railroad, at or near Carondelet aforesaid, for the erection of depots, stations, machine shops, and other purposes connected with the operation of said branch railroad; and thereupon said Pacific Railroad made and delivered to the defendants, Jesse Seligman and James Baker, a mortgage or deed of trust, dated October 1st, 1873, by which said Pacific Railroad conveyed and mortgaged to the said railroad constructed and operated as aforesaid, and extending from a point on the main line of the railroad of the parties of the first part, at or near Kirkwood, thence to the termination of said railroad at the Mississippi river, at Carondelet, or South St. Louis
102 aforesaid, with its appurtenances, including the depots, stations, machine shops, superstructures and erections, on the line of said branch railroad, or at Carondelet aforesaid; together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or which may be acquired or appropriated, for depots, engine houses, car houses,

station houses, warehouses, machine shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid, excluding, however, from the operation or lien of this mortgage the depot at Kirkwood, or any buildings erected, or which may be erected at Kirkwood aforesaid, for or connected with the operations of the main line of said railroad as aforesaid as trustees, and in trust to secure the payment of and issue of five hundred bonds each for the sum of one thousand dollars, dated October 1st, 1873, payable twenty years after date in gold coin of the United States, at the National Bank of Commerce, in the city of New
103 York, and interest thereon at the rate of six per cent. per annum, gold coin, aforesaid, semi-annually on the first day of April and October, on the presentation of coupons or interests warrants annexed thereto.

That said mortgage contained a clause to the effect that if the Pacific Railroad should fail to pay the interest on any of said bonds for six months after demand made therefor, or if the principal sum of any of said bonds, when the same became due and payable, should not be paid for a like period, after like demand, said trustees were authorized and required, upon the written request of the holders of bonds to the amount of one hundred thousand dollars, the principal or interest of which should be in arrears and unpaid, to sell the said property at the court house in St. Louis, first giving ninety days notice thereof, as in said mortgage mentioned, and on such sale to execute and deliver conveyances thereof; to transfer and convey said property to the purchaser thereof; and to apply the net proceeds to the payment of all the bonds secured by the said mortgage pro rata.

That each and all of said bonds mentioned in said mortgage
104 were duly executed, issued, and negotiated by the said Pacific Railroad, and are now outstanding and unpaid, and that the interest thereon has been regularly paid, and that no interest will become due thereon until April 1, 1876; and that said mortgage is a first lien on the property therein mentioned.

Fifth. That the said Pacific Railroad made and delivered to the defendants Henry F. Vail and James D. Fish a mortgage or deed of trust, dated July 10, 1875, by which said Pacific Railroad conveyed and mortgaged to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said railroad, included in and covered by each of the four mortgages hereinbefore mentioned, as follows, that is to say:

1. The line of the said Pacific Railroad extending from the depot at Seventh street in the city of St. Louis, two hundred and eighty-three miles in length, with its appurtenances, including the real estate, depots, stations, machine shops, machinery, rights, inter-
105 ests, and franchises of the said railroad, subject to the liens of the two mortgages hereinbefore mentioned, severally executed by said company, one of which was so executed to said Murdock,

Punnett, and Clark, and the other of which was executed to the said Edwin D. Morgan and Joseph Seligman.

2. All and singular the following-described real estate in the city of St. Louis, state of Missouri, viz:

Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen of the city of St. Louis, bounded east by Twefth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the south-
106 west corner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also the following-described real estate in the city block number four hundred and thirty-eight, viz: Beginning at the northwest corner of Eleventh and Cerre streets, in the city of St. Louis, the southeast corner of said block, thence west along the north side of Cerre street one hundred and fifty-two feet and six inches more or less to an alley; thence north one hundred feet; thence east parallel to Cerre street one hundred and fifty-two feet and six inches to Eleventh street to the place of beginning.

Also the following, viz: Commencing at the sothwest corner of city block number four hundred thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

107 Also the following-described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line to the northeast corner of said block 439; thence along the south line of Cerre street to the place of beginning, being the same property mentioned and described in the aforesaid mortgage executed to Lackland and Durkee, and said premises being so conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad constructed and operated, and extending from a point on the main line at or near Kirkwood; thence to the termination of the said railroad at the Mississippi river at Carondelet or south St. Louis, with its appurtenances including the depots, stations, machine shops, superstructures, and erections on the line of said branch
108 railroad, or at Carondelet aforesaid, together with all the side track and switches connected with said branch railroad, and

also the lands acquired and appropriated or that may be acquired or appropriated, for depots, engine houses, car houses, station houses, warehouses, machine shops, or other superstructures, and erections on the line of said branch railroad, or at Corondelet aforesaid, which said last mentioned premises and property were so mortgaged, subject to the lien of the aforesaid mortgage to Jesse Seligman and James Baker.

That said several parcels of property, franchises and appurtenances, were so conveyed to Henry F. Vail and James D. Fish, as trustee, and in trust to secure the payment of an issue of four thousand bonds, therein and herein termed "third mortgage bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer in lawful money of the United States, at the office of the Atlantic & Pacific Railroad company, in New York, with interest at seven per cent. per annum, from May 2st, 1872, in like lawful money, semi-annually, on the first of November
109 and May in each year, on the presentation of coupons annexed to said bonds; and that the payment of the principal and interest of each of said bonds were guaranteed by the Atlantic & Pacific Railroad company.

That said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds thereby secured for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of said bonds when payable should not be paid for six months after demand, said trustees were authorized and required, on the written request of holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrear or unpaid, to sell the said railroad and branch railroad, and all the property by said mortgage conveyed, at public auction, in the city of St. Louis, giving notice thereof as specified in said mortgage, and to execute and deliver conveyances to transfer and convey said property to the purchaser or purchasers, who might immediately
110 enter upon and take possession of the same, and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage and then unpaid pro rata.

That said last-mentioned mortgage, dated July 10th, 1875, recited the fact, and your orator, on information and belief, avers the fact to be, that said Pacific Railroad had issued its bonds, amounting in the aggregate to fifteen hundred thousand dollars, and designated as "income bonds," each of which bonds was dated September 2d, 1872, and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable in lawful money of the United States, on the 1st of September, 1892, with interest at seven per cent. per annum, in like lawful currency, on the first of March and September in each year, and that said company had also made a further issue of bonds, amounting in the aggregate to the principal

sum of two millions dollars, and designated as "improvement
111 bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable in lawful money of the United States on the first of November, 1889, with interest at seven per cent. per annum, in like lawful money, payable on the first of May and November in each year on the presentation of coupons annexed to said bonds.

That the interest and principal of said "income" and "improvement" bonds were chargeable against and payable out of the earnings of the said railroad prior to any dividend on its capital stock, but were not secured by any mortgage or lien upon any of the property hereinbefore mentioned.

That said mortgage also recited and declared that a portion of said third mortgage bonds should be used in retiring and cancelling the issue of income bonds and improvement bonds last above mentioned, so far as the same could be done, and that the residue of said bonds should be issued by said company for the purpose of obtaining additional sums of money for the future permanent improvement of its road.

112 Your orator further shows unto your honors that the entire amount of third mortgage bonds secured by said mortgage were issued by said company, and that a sufficient number of said bonds to retire the "income" and "improvement" bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit, said Vail & Fish, for the purpose of being exchanged for such "income" and "improvement" bonds; and upon information and belief your orator charges that about two millions dollars of said bonds have been exchanged for "income" and "improvement" bonds, as above mentioned, and that in addition upwards of three hundred thousand dollars of said bonds have been negotiated by said company, and that all of said bonds secured by said third mortgage are now outstanding and unpaid, and that none of the interest which became due on said bonds, or any of them, on the first of November, 1875, has been paid, but that the whole amount thereof remains due and unpaid; and that your orator is the holder of many of said third mortgage bonds secured by the aforesaid third mortgage,
113 and that the interest which became due on said bonds was duly demanded on the first day of November, 1875, according to the terms of said mortgage, and the coupons representing said interest were presented for payment at the place where the same, by the terms thereof, are payable, on the first day of November, 1875, and payment demand and refused.

Your orator further shows that each and every of the mortgages hereinbefore mentioned was duly recorded in the proper offices, and that no proceedings at law have been had or taken in behalf of any holder of any of the bonds secured by any of the aforesaid mortgages for the recovery of the principal or interest of any of the said bonds herein mentioned or secured by said mortgage, nor any

suit or action commenced in regard to or upon said mortgages, or either of them.

Sixth. Your orator further shows unto your honors that the Pacific Railroad, defendant herein, is a corporation created by and under the laws of Missouri, and that on the 29th of June, 1872, the
114 said Pacific Railroad owned and operated a railroad extending from St. Louis aforesaid to Kansas City, on the western boundary line of the state of Missouri, and which said road extended through Franklin, and also operated several lines of railway connected with its main line and which had been therefor leased to it by various railroad corporations owning such lines, and which last-mentioned lines so leased and then operated by said Pacific Railroad (of Missouri) extended to and from the following points, that is to say:

From Tipton to Boonville, both in Missouri, a distance of twenty-five miles; from Sedalia to Lexington, both in Missouri, a distance of fifty-five miles; from Kansas City aforesaid to Leavenworth, Kansas, a distance of twenty-five miles; and from Leavenworth aforesaid to Atchison, Kansas, a distance of twenty-one miles; and your orator charges that the the said leased lines and the property appurtenant thereto are bound by the lien of the aforesaid mortgage to James Baker and Henry F. Vail.

That on said last-mentioned day the said Atlantic & Pacific
115 Railroad company was engaged in the operation of a continuous line of railway from Franklin, in the state of Missouri, distant about thirty-seven miles west from St. Louis, to the western boundary of said state, and thence to Vinila, distant therefrom thirty-five miles; and that said corporation had no mode of reaching St. Louis aforesaid, except over the road of the Pacific Railroad, defendant herein, and that it had no passenger depots, or other adequate depots or facilities for the transaction of its business at St. Louis aforesaid.

That on the day last aforesaid, to wit, the twenty-ninth of June, 1872, the said Pacific Railroad (of Missouri) leased to the said Atlantic & Pacific Railroad company upon the terms and conditions in said lease mentioned the entire line of railroad then operated by it, including the several lines of railway so leased to it, as last aforesaid; and thereupon the said Atlantic & Pacific Railroad company took possession of said lines of railway, so leased, and managed and operated the same; and that subsequently to said
116 lease and additional line of road extending from Kirkwood, on the line of said Pacific Railroad, to Carondelet, on the Mississippi river, a distance of fifteen and one-half miles, being the "Carondelet Branch" hereinbefore mentioned, was built, and has been managed and operated by the said Atlantic and Pacific Railroad company; and that additions and improvements have been from time to time made since said lease by the erection of depots, freight-houses, car-houses and other structures at and in the immediate vicinity of St. Louis aforesaid and elsewhere, which were deemed

necessary for carrying on the business of said roads, and large amounts of money expended thereon and thereabout, and also in the purchase of locomotive engines and cars and rolling stock of various descriptions used in operating said road; and since said lease as aforesaid the entire lines of road extending from St. Louis through Franklin aforesaid to the terminal points of the lines of road of said Atlantic and Pacific Railroad company and of said Pacific Railroad,
117 respectively, as above stated, including the lines of road so leased to said Pacific Railroad (of Missouri) and said Carondelet Branch have been operated as one road; and that all the property hereinbefore mentioned is in the possession of the Atlantic and Pacific Railroad Company, and that as your orator is advised and believes it is necessary and essential for the interests of all parties interested in said several lines of road and of the mortgage creditors of said two companies respectively that said road should be continued to be operated and managed as one road, proper regard being had to the rights of creditors having liens by mortgage upon portions of the railroad premises and property originally belonging to the said Pacific Railroad (of Missouri.)

Seventh. Your orator further shows unto your honors that by the terms of the lease to the said Atlantic and Pacific Railroad company, the latter company agreed to and became bound to pay the interest on all the mortgages theretofore issued and executed by the said Pacific Railroad, including the mortgages herein firstly, sec-
118 secondly and thirdly mentioned and described, and also all moneys required to be paid by the said Pacific Railroad under the leases of the several leased lines hereinbefore mentioned, and also certain dividends upon the stock of the said Pacific Railroad as specified in said lease; and that by the terms of said lease a dividend to the shareholders of the said Pacific Railroad of one and one-half per cent. upon the capital stock of the said company became payable under said lease on the 20th day of October, 1875, and that default was made in the payment thereof and the same still remains due and unpaid.

That in pursuance of the said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic & Pacific Railroad company in the name of the said Pacific Railroad, defendant herein, and for the payment of which said last-named company is liable, and that said last-named company is also liable to pay the principal and interest of the third mortgage bonds, dated July 10, 1875, to Baker and Vail.

119 That the said Atlantic & Pacific Railroad company has made default in the payment of interest upon its bonds secured by mortgage*d* executed upon the property originally belonging to it before the making of said lease, and has become embarrassed by floating debts to a very large amount, and has been unable to pay the dividends above mentioned, and the interest due November 1st, 1875, upon the third mortgage bonds herein mentioned, and that the creditors of said Pacific Railroad and of the said Atlantic &

Pacific Railroad company have threatened to sue said corporations, and each of them, and have sued said last-named corporation.

That there is a large sum of money due for taxes remaining unpaid, for which each of the said railroad companies is responsible, and that the said Pacific Railroad is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested, and that it is liable to actions, suits, and proceedings on account thereof, and that the
120 said Atlantic & Pacific Railroad company is without sufficient means to pay and discharge its valid obligations as they become due; that its commercial paper has been protested, and that it is liable to actions, suits, and proceedings on account thereof, and that there is great danger that the property covered by the third mortgage hereinbefore mentioned may be attached or levied upon under execution or other legal process.

That the interest upon the first and second mortgages mentioned herein has been regularly paid as the same became due, and that the premises covered by said mortgages are an abundant and ample security for the payment of the bonds secured by those two mortgages as they mature, and that the net earnings and revenue of the railroad therein mentioned have been, are, and will be ample and sufficient to provide for, pay, and keep down the interest to become due under all the mortgages hereinbefore mentioned, which are prior liens to the third mortgage, but that the said mortgaged premises are an insufficient and inadequate security for the payment of the
121 amount due and to become due under the mortgage last aforesaid, and that the rights and interests of all the parties interested in the said last-mentioned mortgage, and the rights and interests of creditors of said Pacific Railroad not secured by mortgage, require that a receiver should be appointed as hereinafter prayed for.

Your orator further, on information and belief, alleges that default having been made, as hereinbefore stated, by the Atlantic & Pacific Railroad Company in the payment of interest upon one of the mortgages executed and issued by that company to secure the payment of an issue of six millions dollars of bonds, an action was instituted on behalf of the holders of such bonds to foreclose such mortgage and for the appointment of a receiver of the property and effect of the said company, including the property leased to it by the Pacific Railroad, defendant herein, and that such action is still pending and undetermined.

Eight. Your orator further shows unto your honors that an
122 application has been made by your orator on behalf of himself and other holders of bonds secured by said mortgage to the defendants, Henry F. Vail and James D. Fish, to take proceedings to foreclose the aforesaid mortgage and to protect the interests of your orator and such other holders, but that no such proceedings have been taken, and, as your orator is informed and believes, some doubts is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by

reason of the non-payment of the interest due November 1st, 1875, and for such reasons prefer not to take such proceedings; and your orator, being apprehensive that his interests, and the interests of the other holders of like bonds, may be previously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action on his own behalf, and on behalf of all others similarly situated and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein.

123 In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable:

Your orator therefore prays that the said mortgage, dated July 10th, 1875, executed by said Pacific Railroad to the defendants Vail and Fish, may be foreclosed, and that the premises and property covered thereby may be sold under a decree of this honorable court; that the premises and property covered thereby, which are, by the terms thereof, subject to the two mortgages, one dated July 15th, 1868, to the defendants Murdock, Punnett, and Clark, and the other dated July 1st, 1871, to the defendants Edwin D. Morgan and Joseph Seligman, may be sold separately, subject to the lien of said two mortgages; and that the real estate embraced in said mortgage of July 10th, 1875, which is thereby subject to the mortgage dated April 19th, 1872, to the defendants Lackland and Durkee, may be sold separately, subject to the lein of said last-mentioned

124 mortgage; and the branch railroad and other property embraced in said mortgage of July 10th, 1875, which by the terms thereof are subject to the mortgage dated October 1st, 1873, to the defendants Jesse Seligman and James Baker, may be sold separately, subject to the lien of said last-mentioned mortgage; or if the court should determine that all the property embraced in said mortgage of July 10th, 1875, should be sold in one parcel, subject to the liens of the mortgages thereon existing prior to said July 10th, 1875, the same may be sold; and that if the court should determine that all the property covered by said several mortgages be sold and the proceeds applied to the extinguishment of the several prior mortgages thereon, then that the net proceeds of the several parcels of property covered by said several prior mortgages, (the liens of which said several prior mortgages upon the several parcels of property embraced therein are hereby recognized,) may be applied to the payment of said mortgages respectively, and that subject to the payment of such prior liens, the net proceeds of the sale of the mort-

125 gage premises under the mortgage of July 10th, 1875, may be applied to the payment of all bonds secured by said mortgage last mentioned at that time outstanding and unpaid, and of the interest thereon, without discrimination or preference and rateably; and that the said several defendants in this action, and all persons claiming under them, or either of them, may be forever barred and

foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof.

Your orator further prays that, if necessary, an account may be taken of the bonds secured by the said mortgages, and of the amount due on said bonds for principal and interest, or either, and that a receiver be appointed, according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, and earnings, rights, privileges, franchises, and
126 immunities of the Pacific Railroad, including the lines of railway and other property transferred to and possessed by the said Atlantic and Pacific Railroad company, under the aforesaid lease from the Pacific Railroad (of Missouri) or operated by said Atlantic & Pacific Railroad company, as hereinbefore stated, and rolling stock and other property appurtenant to said lines of railway; and that a writ of injunction be issued out of and under the seal of this honorable court, or by one of your honors, according to the form of the statute in such case made and provided, enjoining and restraining the said defendants herein, and each and every of them, except the receiver appointed by this court, from interfering with, transferring, selling, or disposing of any of the property aforesaid, or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property aforesaid, or of which said receiver may be appointed; and that your orator may have such further or other relief in the premises as to this honorable court shall seem meet.

127 And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the defendants, the Pacific Railroad, the Atlantic & Pacific Railroad company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry J. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, respectively, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide by the said order, direction, and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

And as to the said several parties who are properly defendants to this bill of complaint, and who may be out of the jurisdiction of this court, your orator prays that process may be issued to make them parties if they should come within such jurisdiction;
128 or that, if they should not come within such jurisdiction, such proceedings may be had in regard to such defendants, by publication or otherwise, to conclude them in this behalf, as may be authorized by and be according the statutes in such case made and provided.

And your orators, as in duty bound, will ever pray, &c.

GEORGE E. KETCHUM.

SHARP & BROADHEAD,
of Counsel for Compl't.

UNITED STATES OF AMERICA,
Southern district of New York, } *ss.*

George E. Ketchum, being duly sworn, says that he is the plaintiff in the foregoing bill named, and has read the same, and knows the contents thereof, and that the facts and matters therein stated are true. GEORGE E. KETCHUM.

Sworn and subscribed before me by the said George E. Ketchum on this 3d day of Nov., 1875. GEO. F. BETTS,
(SEAL.) *U. S. Commissioner.*

129 *Exhibit B.*—Attached to complaint of Pacific Railroad.

Copy of decree of foreclosure and sale in case of George E. Ketchum and others *vs.* Pacific Railroad and others.

Adjourned term, June, 1876, circuit court of the United States, eastern district of Missouri.

And on the said 6th day of June, 1876, the following further proceedings were had in said cause, to wit:

Decree of Foreclosure and Sale.

George E. Ketchum et al., complainants,
vs.
The Pacific Railroad, the Atlantic and Pacific Railroad Company et al., defendants. } In chancery. No. 703.

And now at this day comes the said complainant by James O. Broadhead, his solicitor, and Cornelius K. Garrison, who, by the order of this court has been made a co-complainant herein, by his solicitors, Cline, Jamison & Day, and also James Seligman and Thos. W. Pierce, who have also by the order of this court been made
130 co-complainants herein by their solicitors, Grover & Ellis; and also the defendants, the Atlantic and Pacific Railroad company, by its solicitor, Joseph N. Litton, and the Pacific railroad, by James Baker, its solicitor; and the said Rufus J. Lackland and Dwight Durkee, appearing by their solicitor, A. M. Gardner; and the said Jesse Seligman, Edwin D. Morgan, Uriel A. Murdock, Joseph Seligman, Luthur C. Clark, appearing by their solicitor, James Baker; and the said Henry F. Vail and James D. Fish, appearing by their solicitors, Noble & Orrick; and the said James Baker, appearing in his own proper person; and it having been suggested to the court that James Plunnett has departed this life

since the institution of this suit, it is ordered by the court that this suit abate as to him.

And therefore, the said cause coming on to be heard upon the bill of said complaint, and the answers of said defendants, and the exhibits and proofs in the cause, the county of St. Louis and Thomas P. Akers appear by their solicitor, Frank J. Bow-
131 man, and dismiss their answers and cross-bills; and Frank J. Bowman, as solicitor for the county of St. Louis, withdraws the separate answer of the county contesting the validity of said bonds; and it appearing to the court that the Pacific Railroad did, on the 10th day of July, A. D. 1875, make and deliver to the said Henry F. Vail and James D. Fish its mortgage or deed of trust of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said Pacific Railroad, as set forth in the said mortgage of the date last above referred to, and *to* more particularly described as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad (of Missouri), two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, state of Missouri, to the western boundary of said state at Kansas City, and passing through the counties of St. Louis, Franklin, Gascon-
ade, Osage, Cole, Maniteau, Morgan, Cooper, Pettis, Johnson,
132 Cass, and Jackson in said State of Missouri, with its appurtenances, including, among other things, the track on Poplar street and the levee in the city of St. Louis, commonly known as the "Poplar-street track," and including the real estate, depots, stations, machine shop, rolling stock, machinery, rights, and interests, and franchises of said railroad, subject to the liens of the two mortgages described in the bill of complainant, severally executed by said Pacific Railroad, one of which was so executed to said Murdock, Punnett, and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following-described real estate in the city of St. Louis, state of Missouri, viz:

Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street. Also block number two hundred and thirteen of the city of St. Louis, bounded
133 east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street—saving and excepting therefrom lots 26, 29, 33 and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also the following-described real estate in city block number

four hundred and thirty-eight, viz.: beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block, thence west along the north side of Cerré street one hundred and fifty-two feet and six inches more or less to an alley; thence north 100 feet; thence east parallel to Cerré street one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also the following, viz.: commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence *thence* east one hundred and
134 fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

And also the following described tract or parcel of land, viz.: commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and seventy-six feet more or less to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerré street to the place of beginning, being the same property mentioned and described in the bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last-mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Rail-
road construed and operated, and extending from a point
135 on the main line at or near Kirkwood, thence to the termination of the said railroad at the Misssisippi river, at Carondelet, or South St. Louis, with its appurtenances, including the depots, stations, machine-shop, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shop, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid, which said last-mentioned premises and property were so mortgaged, subject to the lien of a mortgage to Jesse Seligman and Joseph Baker, described in the bill of complaint. Which said deed of trust or mortgage, dated July 10th, 1875, was made to said Vail and Fish, described in the bill of complaint as trustees, and in trust to secure the payment of an issue of four thousand bonds, therein termed "third mortgage bonds," of one
thousand dollars each, dated July 10th, 1875, payable
136 twenty years after date to bearer, in lawful money of the United States, at the office of the Atlantic & Pacific Rail-

road company in New York, at seven per cent. per annum, from May 1st, A. D. 1875, in like lawful money, semi-annually on the first of November and May in each year, on the presentation of the coupons annexed to said bonds. And it further appearing that said mortgage or deed of trust provides that if the said Pacific Railroad should fail to pay the interest on any of the said bonds thereby secured for six months after the same should become and payable, and demand made therefor, said trustees were authorized and required, on the written request of the holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrears or unpaid, to sell the said railroad and branch road in the complainant's bill described and set forth, and all the property by mortgage conveyed, at public auction in the city of St. Louis, at the time, on the terms, and in the manner set forth and described in the said mortgage; and to apply the
137 net proceeds of said sale to the payment of all the bonds secured by said mortgage and then unpaid, pro rata.

And it further appearing that the said Pacific Railroad had, prior to the said 10th day of July, A. D. 1875, issued its bond amounting in the aggregate to the sum of fifteen hundred thousand dollars, and designated as "Income Bonds," each of which bonds was dated September 2d, 1872, and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable on the first of September, 1892, with interest at seven per cent. per annum—on the first of March and September of each year; and it further appearing that the said Pacific Railroad had made a further issue of bonds, amounting in the aggregate to the principal sum of two millions of dollars, and designated as "Improvement Bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable on the first of November, 1889, with interest at seven per cent. per annum, payable on the first of May and November in
138 each year, on the presentation of the coupons annexed to said bonds; and it further appearing to the court that by the terms of said "Third Mortgage" it was provided that the said third mortgage bonds bonds should be used in retiring and cancelling the said issue of income bonds and improvement bonds so far as the same could be done; and it further appearing that the entire amount of third mortgage bonds secured by said mortgage were issued by said Pacific Railroad, and that a sufficient number of said bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit: the said Vail and Fish, for the purpose of being exchanged for "Income" and "Improvement Bonds;" and it further appearing that a portion of said bonds have been exchanged for "Income" and "Improvement Bond," and that a portion of said bonds have been negotiated by said company; and it further appearing that a number of said bonds are now in the possession of said trustees, Vail and Fish; and it further appearing that of the said

third mortgage bonds now outstanding none of the interest
139 which became due on said bonds, or any of them, on th first day of November, A. D. 1875, has been paid, but that the whole amount thereof remains due and unpaid; and it further appearing that the said complainant, George E. Ketchum, is the holder and owner of ten of said "Third Mortgage Bonds," secured by the aforesaid mortgage or deed of trust; that the said Cornelius K. Garrison is the owner and holder of fourteen hundred of said bonds; and that the said James Seligman is the owner and holder of three hundred and forty-seven of said bonds; and that the said Thomas W. Pierce is the owner and holder of fifty of said bonds, secured by said mortgage, and that the payment of the interest, which became due on said eighteen hundred and seven bonds on the first day of November, A. D. 1875, was duly demanded on said day, according to the tenor of said mortgage, and that the coupons representing said interest were presented for payment at the place where the same, by the terms thereof, are payable, and payment thereof demanded and refused. And it further appearing
140 to the court that the interest of the said complainant, and the interests of other holders of like bonds, may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorizsd to sell the property secured by said mortgage until six months after demand made for the payment of said interest—

Now, therefore, the court, being fully advised in the premises, and by the consent of the parties to this suit through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged, and decreed as follows, to wit:

That the said Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, property, and franchises, and that the said Pacific Railway and property, together with the franchises and appurtenances of the said railway company, as in said deed of trust or mortgage, dated July 10, 1875, is described, to be sold at public auction by Seymour D. Thompson, master in chancery of this court, to pay and satisfy the amounts
141 due by said company upon said bonds, and any other indebtedness which the court may order to be paid out of the proceeds of said sale, together with the costs of suit and of said sale, including the services of said trustees and their solicitors and attorneys' fees in and about the management of said trust as may hereafter be ordered by this court; and that upon said sale the said master shall execute a certificate stating such sale and setting out the terms and conditions thereof, and that he report said sale and the terms and conditions thereof, immediately after said sale, to the court; and that upon the terms of such sale being complied with, and the sale approved and confirmed by, the court, said master be, and he is hereby, authorized and directed to execute and

deliver to the purchaser or purchasers of said property good and sufficient deed or deeds for the same.

And it is further ordered that upon the sale of the said road, property, and franchises, the said Seymour D. Thompson,
142 master, shall require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash or the delivery to him of a good and sufficient bond, with sureties to be by him approved, for the payment of such sum of $200,000 when and as soon as thereto required by the court.

And it is further ordered and decreed that the terms and conditions of said sale shall be the payment of said sum of two hundred thousand dollars cash, or the execution and delivery of the bond hereinbefore specified, on the delivery of the certificate of sale by said master, and that the balance of the sum bid shall, unless the purchaser be a bondholder, or shall represent bondholders, be paid in cash at the confirmation of said sale, should such sale be confirmed; and if said purchaser shall be a bondholder, or represent bona fide bondholders, then, and in that event, should said sale be confirmed, he shall pay, or cause to be paid, in cash, said sum of two hundred thousand dollars, and also the pro rata propor-
143 tion from the proceeds of such sale, which may be by the said court then found due to the other bona fide bondholders, and the balance, after such cash payment, may be paid in bonds, bona fide owned or represented by him, the court expressly reserving for future consideration all questions as to the rights, priorities, and interests of all parties claiming any interest herein by way of bonds or otherwise.

And it is further ordered that the said master shall designate the time of making such sale, and shall advertise the same, together with a description of the property and franchises to be sold by publication, showing the time, terms, and place of sale, and the property and franchises to be sold, to be inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missiouri, in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of said newspapers, the same to be inserted in each of said papers once a week during the first three weeks of said period, three
144 times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale; and the receivers are directed, on the certificate of the master, to audit and pay the expenses of such advertising, and also the expenses of printing this decree.

It is further ordered, adjudged, and decreed that all the premises, property, and franchises covered by and embraced in the said mortgage sued on, viz., the mortgage dated July 10th, 1875, shall be sold in a body and not separately, so that the purchaser or purchasers at said sale shall acquire the whole of the property, premises, and

franchises embraced in said last-named mortgage, subject to all prior mortgages.

It is further ordered, adjudged, and decreed that in case said road, property, and franchises shall be purchased by bondholders, or by trustees for bondholders, then, at any time within sixty days after said sale, any bona fide holder or holders of said third mort-
145 gage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers in the property purchased, in the proportion that the bonds so held by him or them bears to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens, and under the same scheme as may be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed, provided that at the time of his election to share in such purchase he shall pay his proportion of the money and expenses paid by the original purchaser.

It is further ordered, adjudged, and decreed that any person or persons holding any of the "income bonds," or the "improvement bonds," above referred to, be and they are hereby authorized, at any time before the sale of said property, to exchange their income or improvement bonds for third mortgage bonds now held by the
146 said trustees Vail and Fish, as is provided in said third mortgage.

It is further ordered, adjudged, and decreed, that nothing in this decree contained shall be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appears by the amended petition in this cause filed by said county, for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000 and interest thereon, and alleged and claimed by the said county of St. Louis, to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this court, if not otherwise satisfactorily adjusted.

And it is further ordered and decreed that nothing herein contained, or proceedings had in this cause, shall in any manner affect the rights of the Boonville Branch Railroad or its right to rent therefor.

147 It is further ordered, adjudged, and decreed that any party purchasing under this decree shall, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum, not exceeding two hundred thousand dollars, as and when this court may require and direct to be paid, for the purpose of satisfying any statutory, equitable, or other lien claims that have been or may be filed in this case, or in the case of Calvin Littlefield *vs.* the Atlantic and Pacific Railroad company and others, pending

in this court, and which have been or may hereafter be directed by the court to be paid by the receivers of either of said companies, and which on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad company and the receivers of the said Pacific Railroad in respect to said liens and payments, may be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad company.

148 *Exhibit "B."*—Continued.

Copy of deed from master to Baker, dated Oct. 24, 1876, made in case of Ketchum *vs.* Pacific Railroad.

UNITED STATES OF AMERICA,
Eastern district of Missouri.

This indenture, made in triplicate this twenty-fourth day of October, A. D. 1876, by and between Seymour D. Thompson, esquire, a master in chancery of the United States circuit court for the eastern district of Missouri, duly appointed and qualified as such, party of first part, and James Bark, esquire, party of the second part, witnesseth:

That whereas the Pacific Railroad, a corporation chartered and existing under and by virtue of the laws of the state of Missouri, did on the 10th day of July, A. D. 1875, make and deliver to Henry F. Vail and James D. Fish, trustees, its mortgage or deed of trust of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal,
149 rights, interests, and franchises of the said Pacific Railroad to secure certain bonds therein mentioned and described, as set forth in the said mortgage, and which is hereinafter more particularly described;

And whereas George E. Ketchum, a holder of certain of the bonds secured by said mortage did, on the eleventh day of November, A. D. 1875, exhibit his bill of complaint in the circuit court of the United States in and for the district aforesaid, praying that the equity of redemption in and to the property, interests, and franchises, embraced in said mortgage or deed of trust, be forever barred and foreclosed, and that said property, interests, and franchises be sold to enforce the lien on the same, and to satisfy the debt thereby secured;

And whereas such proceedings were had under the said bill of complaint in said court that at an adjourned term thereof, and on the sixth day of June, A. D. 1876, a decree was entered thereunder, the name and the style of the said cause being "George E. Ketchum et al., complainants against the Pacific Railroad et al., defendants, No. 703, in equity," that the said Pacific Railroad should stand
150 absolutely debarred and foreclosed of and from all equity of redemption of and to the said mortgage premises, property, and franchises, and that the Pacific Railroad property, together with the fran-

chises and appurtenances of the said railway company as in said deed of trust or mortgage dated July 10th, 1875, is described should be sold at public aution by the undersigned, Seymour D. Thompson, master in chancery of said court, to pay and satisfy the amounts due by said Pacific Railroad upon said bonds, and any other indebtedness which the court might order to be paid out of the proceeds of said sale, together with the costs of said suit and of sale, including the services of said trustees and their solicitors and attorney's fees in and about the management of said trust as might thereafter be ordered by the court, and which decree further provided that upon said sale the said master should execute a certificate stating such sale and setting out the terms and conditions thereof immediately after said sale to the court; and that upon the terms of such sale being com-
151 plied with and the sale approved and confirmed by the court, said master should be, and he was, by said decree, authorized and directed to execute and deliver to the purchaser or purchasers of said property a good and sufficient deed or deeds for the same;

And whereas it was further provided in said decree that upon the sale of said road, property and franchises, the undersigned, Seymour D. Thompson, master, should require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond, with sureties to be by him approved, for the payment of such sum of two hundred thousand dollars when and as soon as thereunto required by the court;

And whereas it was further ordered and decreed that the terms and conditions of said sale should be the payment of the said sum of two hundred thousand dollars cash, or the execution and delivery of the bond thereinbefore specified, or the delivery of the certificate of sale by said master, and that the balance of the sum bid should, unless the purchaser were a holder, or should represent bond-
152 holder, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser should be a bondholder, or represent bona-fide bondholders, then, and in that event, should said sale be confirmed, that he should pay, or caused to be paid, in cash, said sum of two hundred thousand dollars, and also the pro rata portion from the proceeds of such sale, which might be by the said court then found due to the other bona-fide bondholders; and that the balance, after such cash payment, might be paid in bonds bona-fide owned or represented by him, the court expressly reserving for future considerations all questions as to the rights, priorities and interests of all parties claiming any interests herein by way of bonds or otherwise;

And whereas it was further ordered in said decree that the undersigned master in chancery should designate the time of making such sale, and should advertise the same, together with a description of the property and franchises to be sold, by publication, showing the time, terms and place of sale and the
153 property and franchises to be sold, to be inserted in the St. Louis Globe-Democrat, published in the city of St. Louis,

Missouri, in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of the said newspapers, the same to be inserted in each of said newspapers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale;

And whereas it was further ordered, adjudged and decreed in said decree that all the premises, property, and franchises covered by and embraced in the said mortgage sued on, viz., the mortgage dated July 10, 1875, should be sold in a body, and not separately, so that the purchaser or purchasers at said sale should acquire the whole of the property, premises and franchises embraced in said last-named mortgage, subject to all prior mortgages;

154 And whereas it was further ordered, adjudged and decreed in said decree that in case said road, property, and franchises should be purchased by bondholders, or by trustees for bondholders, then, at any time within sixty days after said sale, any bona fide holder or holders of said third mortgage bonds, secured by the mortgage sued on in said cause, should be allowed to become associated with said original purchaser or purchasers in the property purchased, in the proportion that the bonds held by him or them should bear to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as might be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased or for creating a corporation to which said property might be conveyed; provided that at the time of his election to share in said purchases he should pay his proportion of the money and expenses paid by the purchaser;

155 And whereas it was further ordered, adjudged and decreed that nothing in said decree contained should be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appeared by the amended petition in said cause filed by the said county for securing the payment of a certain debt of the said Pacific Railroad to the said county for the sum of seven hundred thousand dollars, and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be thereafter determined by the court, if not otherwise satisfactorily adjusted;

And whereas it was further ordered and decreed in said decree that nothing therein contained or proceedings had in said cause should in any manner affect the rights of the Boonville Branch Railroad, otherwise known as the Osage Valley and Southern Kansas

156 Railroad Company, Boonville extension, or its rights to rent therefor;

And whereas it was further ordered, adjudged, and decreed in said decree that any party purchasing under said decree should, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum, not exceeding two hundred thousand dollars, as and when this court might require and direct to be paid, for the purpose of satisfying any statutory, equitable or other lien claims that had been or might be filed in said cause, or in the case of Calvin Littlefield *v.* The Atlantic and Pacific Railroad Company and others, pending in said court, and which had been or might thereafter be directed by the court to be paid by the receivers or either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad company and the receivers of the Pacific Railroad, in respect to said liens and payments, might be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad company;

157 And whereas I, the undersigned, master in chancery, did, in pursuance of the terms of said decree, designate Wednesday, the sixth day of September, A. D. 1876, between the hours of eight o'clock a. m. and four o'clock p. m. as the time of making such sale, and did advertise the same, together with a description of the property and franchises to be sold, by publication, showing the time, terms and place of sale, and the property and franchises to be sold, which advertisement was inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri; in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of said newspapers, beginning on Thursday, the twenty-second day of June, A. D. 1876, and ending on Tuesday, the twenty-second day of August, A. D. 1876, the said advertisement having been inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion

158 of said period of sixty days, the last insertion having been at least two weeks before the day of sale;

And whereas, proof of publication of the said advertisement, as required by said decree, was duly made and lodged with the undersigned, in conformity to the statute of the state of Missouri, in such cases made and provided, which proof was duly filed by the undersigned, master in chancery, among the papers in said cause, in the office of the clerk of said court, as an exhibit to his report of said sale as hereinafter named;

And whereas I, the undersigned, master in chancery, did, on the sixth day of September, A. D. 1876, at the hour of twelve o'clock meridian, at the east door of the court house in the city of St. Louis, Missouri, after reading to the persons there assembled a duly certified copy of the decree aforesaid, and also a copy of the said advertisement, expose to sale at public auction, in a body, not separately, and subject to all prior liens and mortgages, as provided for in said decree, all the property, rights, interests and franchises of the said

Pacific Railroad (of Missouri,) described in the said mort-
159 gage or deed of trust dated July 10, 1875, made by said Pacific Railroad to Henry F. Vail and James D. Fish, trustees, and hereinafter more particularly described;

And whereas James Baker, the party of the second part herein named, did then and there bid for the said property, franchises, and estate, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations, and coditions named in said decree, the sum of three million dollars, ($3,000,000,) and he being the highest and best bidder, and no other person, after full and fair notice given, being willing to offer any advance upon said bid, the said property, franchises, and estate were then and there sold to him, the said James Baker, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations, and conditions named in said decree and hereinbefore set forth;

And whereas the said James Baker did thereupon sign an acknowledgment of the fact and amount of his said bid, and did
160 then and there execute and deliver to the undersigned master in chancery a bond to secure the payment of the sum of two hundred thousand dollars, as provided for in the said decree, and the said James Baker and the sureties whose names appear on said bond did acknowledge their signatures and seals to the same in the presence of the undersigned; and the said bond was, by the undersigned, found to be a good and sufficient bond to secure the sum in question, and was, therefore, approved by the undersigned;

And whereas afterwards, to wit, on the 15th day of September, A. D. 1876, I, the undersigned master in chancery, did lodge, in the office of the clerk of said court my report of said sale, addressed to the judges of the said court, and setting forth fully my doing under the said decree;

And whereas afterwards, to wit, on the seventh day of October, A. D. 1876, a decree was entered in the said cause reciting that the said sale was in all respects regular and in accordance with the terms and requirements of said decree, and ordering that the same be confirmed;

161 And whereas the said James Baker, party of the second part, did, on the 20th day of October, A. D. 1876, deliver to the undersigned, in part payment of his said purchase, three thousand nine hundred and forty-eight (3,948) bonds of the Pacific Railroad, known as third-mortgage bonds, for the payment of one thousand dollars ($1,000) each, dated July 10th, 1875, signed by Samuel Hays, president of the Pacific Railroad, and countersigned by J. L. Dearborn, treasurer of the said corporation, and sealed with their corporate seal; and did on the 23d day of October, A. D. 1876, pay into the registry of the court the sum of fifty thousand dollars ($50,000) in cash, and did on the same day enter into a bond with sureties, then and there by the court approved, to pay such further sum not exceeding five hundred and fifty thousand dollars ($550,000)

whenever required by the court, and in such instalments as the court should require;

And whereas such payments of bonds and of money, and the giving of such bond, were accepted by the court as a compliance on the part of said James Baker, party of the secoad part, with the
162 terms and conditions of said sale, it having been adjudged by the court that he purchased the said property, franchises, and estate as the representative of bona fide holders;

And whereas on the twenty-third day of October, A. D. 1875, an order was entered in said cause requiring the undersigned master in chancery to make and deliver to the said James Baker, party of the second part, this deed of conveyance of the property, franchises, and estate embraced in said mortgage, decree, and sale, the court having first approved said deed in substance and in form;

Now, therefore, in considerhtion of the premises, and by virtue of the powers vested in me by my said office of master in chancery of said court, and by the decrees and orders aforesaid, and in obedience to the said decrees and orders, and in order to give effect to the same, I, the said party of the first part, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said James Baker, party of the second part, his heirs and assigns forever, subject to the terms, limitations, and re-
163 strictions enumerated in said decree of June 6th, 1876, all the right, title, interest, and estate of the Pacific Railroad in and to the property and franchises embraced in the deed of mortgage bearing date of July the tenth, A. D. 1875, as aforesaid, and also as described in said deed of foreclosure and sale, and in the advertisements of said sale as aforesaid as follows; that is to say:

1. All and singular the entire line of the Pacific Railroad (of Missouri), two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, state of Missouri, to the western boundary of said state, at Kansas city, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Monitan, Morgan, Cooper, Pettes, Johnson, Cass, and Jackson, in the said state of Missouri, with its appurtenances, including, among other things, the track on Poplar street and the levee, in the city of St. Louis, commonly known as "the Poplar-street track," and including the real estate, depots, stations, machine shops, rolling stock, machinery, rights, and interest and franchises of
164 the said railroad company, subject to the liens of the two mortgages described in the said bill of complaint severally executed by said Pacific Railroad, one of which was so executed to Murdock, Punnett, and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following-described real estate in the city of St. Louis, state of Missouri, viz.:

Four blocks of ground in the city of St. Louis, being city blocks, numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-

three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street. Also block number two hundred and thirteen of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block,
165 sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also the following described real estate in city block number four hundred and thirty-eight, viz.: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet and six inches, to Eleventh street; thence southerly, on the line of Eleventh street, to the place of beginning.

Also the following, viz.:

Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches, to an alley; thence south one hundred and four feet six inches, to Cerré
166 street; thence west one hundred and fifty-two feet six inches, to Twelfth street, the place of beginning.

And also the following described tract or parcel of land, viz.:

Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerré street to the place of beginning; being the same property mentioned and described in said bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi river at Carondelet or South St.
167 Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side-tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid; which

said last mentioned premises and property were so mortgaged subject to the lien of a mortgage to Jesse Seligman and James Baker, described in the bill of complaint.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and all the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, and whatsoever, either in law or in equity, of the said Pacific Railroad, and of the said Vail and Fish, trustees, in and to the above described premises and their
168 hereditaments and appurtenances, which the undersigned is, by virtue of the various decrees and others hereinbefore enumerated, entitled to convey.

To have and to hold the same unto the said James Baker, party of the second part, his heirs and assigns, to his and their only property, use, and benefit forever.

In witness whereof the party of the first part, as master in chancery of said court, has hereunto set his hand and seal the day and the year first above written.

[SEAL.] SEYMOUR D. THOMPSON,
Master in Chancery of said Court.

And it further appearing to the court that the said deed is correct in form and substance, and that all the recitals in said deed contained are true and correct: now, therefore, it is ordered and decreed that the said Seymour D. Thompson, master in chancery, do execute, acknowledge and deliver to the said James Baker a deed in duplicate, in tenor and form as submitted to the court and hereinbefore set forth of the said property and franchises, and upon
169 the delivery of said deed the receiver heretofore appointed by the court in this case are authorized and directed to turn over said property to the said Baker or his assigns, taking a proper inventory thereof and a receipt therefor.

And afterwards, to wit, on the 25th day of October of said term, the following appears of record in said cause, to wit:

George E. Ketchum et al.
vs.
Pacific Railroad et al.

Be it remembered that on this 25th day of October, A. D. 1876, appears in open court Seymour D. Thompson, esquire, master in chancery of this court, and acknowledged that he executed and delivers the deed filed in this cause on the 24th day of October, A. D. 1876, to the grantee therein named, under the orders of this court hereinbefore recited, and for the uses and purposes in said deed and in said orders named.

170 *Exhibit C.*

Lease of Pacific to Atlantic and Pacific.

This indenture, made this twenty-ninth day of June, 1872, between "the Pacific Railroad," a corporation created under and by virtue of the laws of the state of Missouri, party of the first part, "the Atlantic and Pacific Railroad company," a corporation created and organized under and by virtue of an act of Congress of the United States, party of the second part, and "the South Pacific Railroad company," a corporation also created under and by virtue of the laws of the state of Missouri, party of the third part, witnesseth:

Whereas the said party of the first part is the owner of the railroad situate in the state of Missouri, known as the Pacific Railroad, and certain other railroads leased to said party of the first part, as hereinafter more particularly stated;

And whereas the said Atlantic and Pacific Railroad company was created by and under an act of Congress of the United States, entitled "An act granting lands to aid in the construction of a
171 railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast," approved July 27, 1866, and was thereby vested with all the rights, privileges, and immunities necessary to carry into effect the purposes of the said act of Congress, as therein set forth;

And whereas in and by said act it was in substance provided that if the route of the said railroad should be found on the line of any other railroad route, to aid in the construction of which lands had been theretofore granted by the United States, the railroad company receiving the previous grant of land might assign their interest to the said Atlantic and Pacific Railroad company, or might consolidate, confederate, and associate with that company upon the terms named in said act;

And whereas it was also further provided that the said Atlantic and Pacific Railroad company was authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which might be granted to or conferred upon it by the Congress of the United States, by the legislature of any state, or by any
172 corporation, person, or persons, and to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance to its own use for the purposes mentioned in said act;

And whereas the route of the said Atlantic & Pacific Railroad from Springfield, in Missouri, to the western boundary of said state was found to be on the line of the route of the said South Pacific Railroad, and that to aid in the construction of the road of such last-mentioned company a previous grant had been made by the United States under and by virtue of an act of Congress approved June 10, 1852;

And whereas the said Atlantic and Pacific Railroad company was desirous of acquiring the management and control of the said South Pacific Railroad, with all its franchises, rights, powers, and property,

to the end, among other things, that by confederation or association with it, and by the use and employment of it, and the aid and assistance to be derived from said franchises, rights, powers, and property, the said Atlantic and Pacific Railroad company might, so far as it concerned the portion of the railroad which it was required
173 to construct from Springfield west to the western boundary of the said state of Missouri, fulfill the purposes of its corporation, as declared by said act of Congress;

And whereas the said South Pacific Railroad company was created for the purpose, among other things, of constructing and completing a railroad, commencing at or near Washington and Grand avenues, in the city of St. Louis, in the state of Missouri, and terminating at the western boundary of said state, passing through or near the towns of Springfield and Neosho;

And whereas said railroad has been constructed to Franklin, on the line of the Pacific Railroad, party hereto of the first part;

And whereas by an act of the general assembly of the state of Missouri entitled "An act to amend chapter 63 of the general statutes entitled 'Of railroad corporations,' so as to authorize the consolidation, leasing and extension of railroads approved March 24th, 1870, it was, among other things, provided that any railroad organized in pursuance of the laws of the state of Missouri, or of
174 any other state, or of the United States, might lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate, and other property, the whole or a part of which was in the state of Missouri, and constructed, owned, or leased by any other company, if the lines of the road or roads of said companies were continuous or connected at a point either within or without the state of Missouri, on such terms as might be agreed upon between said companies respectively;

And whereas the respective railroads of the said parties of the first part and third parts hereto are continuous and connected within the state of Missouri, and the said party of the third part being desirous of acquiring all the railroad of the said party of the first part, with all its privileges, rights, franchises, real estate and other property, constructed, owned, or leased by said party of the first part, the said Pacific Railroad of Missouri, party of the first part, agreed to and with the party of the third part to grant, lease, and demise railroads and other properties, with all franchises, rights, and
175 privileges thereunto belonging or in any wise appertaining, on the terms, conditions, and limitations, and for the consideration hereinafter mentioned;

And whereas the respective railroads of the said South Pacific Railroad company and of the Atlantic and Pacific Railroad company were continuous and connected at the points both within and on the boundary line of the said state;

And whereas a contract was heretofore made between the South Pacific Railroad company and the Atlantic and Pacific Railroad company, parties hereto, in and by which, after reciting the aforesaid

acts, the said South Pacific Railroad company did, in consideration of the premises and of certain covenants and agreements in said contract contained, covenants and agree with the Atlantic and Pacific Railroad company to sell and convey to that company all and singular the railroad of the said South Pacific Railroad company, and all of its privileges, rights, franchises, real estate, and property of every kind and description, for the consideration and upon the terms and conditions in said contract specified, as by reference
176 thereto will more fully and at large appear;

And whereas the said party of the third part has assigned, transferred and conveyed unto the Atlantic and Pacific Railroad company, party of the second part hereto, the railroad of the said party of the third part, situated in the state of Missouri, and its real estate and other property, including the right to acquire by lease or purchase the railroad of the party of the first part hereto, with all its privileges, rights, franchises, real estate and other property, and the aforesaid contract of a lease made between the said parties of the first part and third parts hereto, and the said party of the second part has acquired the right of the party of the third part hereto, to the lease by this instrument created;

And whereas the said party of the second part has agreed to assume all the contracts, debts, obligations, and liabilities heretofore made or incurred by, or imposed upon said party of the first part, and to stand in its place and stead with reference thereto, and to all suits at law or in equity pending against said party of the first part;

177 Now, therefore, this indenture witnesseth: That the party of the first part, in consideration of the rent, covenants, agreements hereinafter mentioned, reserves and contained on the part and behalf of the party of the second part, its successors and assigns, to be had, kept and performed, and by and with the assent, request and direction of the said party hereto of the third part, and by and with the consent of the majority of the stockholders of the said three companies, respectively, for this purpose first had and obtained, has granted, demised and leased, and by these presents does grant, demise and lease unto the said party of the second part, its successors and assigns, the entire railroad of the party of the first part, extending from its eastern terminus in the city of St. Louis, in the state of Missouri, in a westerly direction to its western terminum, at the western boundary line of the state of Missouri, being in length 283 miles or thereabout; and also the several lines of railway heretofore leased to the said party of the first part, and operated by it under and in pursuance
178 of the several leases hereinafter mentioned, and which leases are, by this instrument, assigned to the party of the second part; and also all the lands, tenements, hereditaments, appurtenances, buildings, fixtures and machinery appurtenant and belonging to or connected with the said railroads, or in any manner used or employed in operating the same; and all rails, ties, fencing

and erections of every kind belonging to, upon, or connected with the said railroads; and all the cars, locomotives, engines, tools, machinery, equipments and appliances belonging to or connected with the said railroads, and the use thereof; and also all and every right of way, license, easement, right, privilege, and immunity of the party of the first part conferred by and possessed and enjoyed under and by virtue of its charter, and of any and every act passed and to be passed amendatory thereof, and otherwise howsoever obtained, with the full right and authority to have, hold and use such rights of way, easements, rights, privileges and immunities as fully as the party of the first part might or could if these presents had not been executed.

179 To have and to hold, all and singular, the above demised railroads, premises, property, estate, and effects, including the right of way, easements, licenses, privileges, and immunities aforesaid unto the party of the second part, its successors and assigns, from the day of the date hereof, for and during the full end and term of nine hundred and ninety-nine years, yielding and paying therefor unto the party of the first part, its successors and assigns, rent at the rate and payable in the way and manner and at the times hereinafter particularly stated:

Provided, however, and it is hereby express y agreed, that nothing herein contained shall be deemed, or in any manner taken, to effect the right of corporate existence of the said Pacific Railroad, party of the first part, or to affect any powers or franchises the exercises of which may from time to time become necessary to protect the interest of its bondholders and stockholders, or the interest of the parties of the second part hereto, according to the true intent and meaning of this instrument.

180 And the said party of the second part, in consideration of the covenants and agreements herein contained and to be performed, fulfilled and kept on the part of the party of the first part, its successors and assigns, hereby for itself, its successors and assigns, covenants and agrees that it will pay, as and for the an'ual rent aforesaid, the interest accruing and to become due and payable from and after the date of these presents, upon seven million of dollars of six per cent. gold bonds issued by said party of the first part, dated 1st August, 1868; upon three million of dollars of seven per cent. currency bonds, also issued by said party of the first part, dated 1st July, 1871; upon seven hundred thousand dollars, being the amount of certain bonds of the county of St. Louis, which were by said county loaned to the said party of the first part, and which it undertook and agreed to pay, and which are due and payable on the first of February, 1885, with interest at the rate of seven per cent. per annum; and upon eight hundred thousand dollars of eight per cent. currency bonds, likewise issued by said

181 party of the first part, all of which said bonds, except the St. Louis county bonds, are secured by mortgages; and will also pay to the shareholders of the said Pacific Railroad company

dividends on all shares of the capital stock of said company now outstanding and recorded on the books thereof for which certificates shall have been, or may be, issued, the first of which dividends shall be declared January 1st, 1873, and shall be payable between the fifteenth and twentieth of January, 1873, and shall be at the rate of five dollars per share for each of such shares; and thereafter, and until and including the dividend which shall be declared on the first of July, 1875, said dividends shall be declared quarterly on the first days of April, July, October, and January in each year, and shall be payable between the fifteenth and twentieth of each of the said months respectively, and shall be at the rate of two and one-half dollars per share for each of said shares; and said sums so to be declared as dividends, during the said period
182 of three years, shall not exceed during that period, in the aggregate, three hundred and sixty-three thousand and thirty dollars per annum; and said dividends to be declared during the next succeeding two years, namely, up to and including the 1st of July, 1877, shall be payable quarterly as above mentioned, at the rate of twelve dollars per share per annum, and shall not exceed during that period, in the aggregate, four hundred and thirty-five thousand six hundred and thirty-six dollars per annum; and said dividends, from and after the first day of July, 1877, shall be declared and payable quarterly as aforesaid, at the rate of fourteen dollars per share per annum, for and during the remainder of the term herein granted and demised; but said sums so to be paid for dividends during the period last mentioned shall not exceed, in the aggregate, five hundred and eight thousand two hundred and forty-two dollars per annum.

It is further covenanted and agreed that the interest to be paid upon the aforesaid bonds, and the dividends to be paid
183 upon the aforesaid stock, shall and may be paid directly to the respective bondholders and stockholders of the said Pacific Railroad; and the right is hereby given to them to prosecute such suits as may be necessary in the premises to recover the dividends or interest thereby agreed to be paid to them, and, if necessary, to use the name of the party of the first part for that purpose.

And it is further agreed that the said party of the first part may hereafter issue, or cause to be issued, any additional shares of the capital stock of said company, so as to increase the number of shares of capital stock now recorded on the books of the said company, to wit, thirty-six thousand three hundred and three shares, to an amount not exceeding double that number of shares; then the rate of dividends thereafter to be paid upon the stock of the party of the first part shall be reduced in the same proportion as the issue of stock is increased, so that the aggregate sums to be paid as dividends upon the stock of said party of the first
184 part, for which certificates shall have been issued, shall not be increased.

And it is further agreed that all sums payable for interest and dividends in pursuance of this lease shall be paid by the party of the second part hereto, free and clear of any income tax imposed thereon by the United States.

And the said party of the second part further covenants and agrees, in manner aforesaid, that, during the term hereby granted, it will, at its own cost, risk, and expense, maintain, preserve, and keep the aforesaid railroads in good working condition and repair, as first-class railroads, and so as to be suitable for the transaction of all the business that can be reasonably done thereon, and will also maintain, preserve, and keep the side-tracks, station-houses, fixtures, appurtenances, tools, machinery, rolling stock and equipments belonging and appertaining to the said railroads in as good repair, order, and condition as the same are in at the date of these presents, so far as the uses thereof will allow, and will operate, employ, and use the said railroads, their fixtures and appur-
185 tenances, in such manner as to do and perform in a proper manner all the business offered to and which can be reasonably done upon the same; and will perform all and every duty and obligation towards the public which the party of the first part would be legally bound to do and perform under its aforesaid charter if these presents had not been executed.

And the party of the second part hereby further covenants and agrees in manner aforesaid that, upon the due presentation of the aforesaid certificates of stock, the dividends upon which are to be paid as aforesaid, it will, by a proper instrument in writing, to be endorsed and stamped thereon respectively, and duly executed, guarantee to the holder and owner thereof payment of the dividends thereon, according to the terms and during the existence of lease; provided, however, and it is hereby understood and agreed, that in case the party of the first part shall fail to keep and perform these presents upon its part, that thereupon such guarantee shall become and be null and void.

And the said party of the second part further covenants
186 and agrees, in manner aforesaid, that during the continuance of this lease it will pay, bear, and discharge all the taxes and assessments of every description assessed, imposed, levied, and accruing upon the railroad, property, and effects hereby demised, and upon the business done upon the said railroad from the day of the date hereof, in the same manner and to the same extent as the party of the first part would be liable to pay if these presents had not been executed; and if, by any change of the law, the present tax or duty required of the said party of the first part shall be required of the said stockholders, then the said party of the second part shall pay the same, but the party of the second part shall not be required to pay the present income tax upon the aforesaid dividends, or any tax thereon imposed, or hereafter to be imposed, by whatever name the same may be called, and if the law under which tax is or may be levied requires the party of the

second part to pay the same, then the amount of tax so paid may be deducted and kept back from and out of the
187 aforesaid dividends. And the party of the second part further agrees, that during the continuance of this lease it will pay all expenses for operating, constructing, repairs, salaries and otherwise, which may be necessarily incurred on account of the railroads and demised premises, from the day of the date hereof; and will also pay and discharge all damages which may be recovered against the said party of the first part for injuries to persons or property, or for negligence, or breach of duty as carriers or warehousemen, and in all respects save the said party of the first part harmless and indemnified from all damages, losses, and penalties which may be incurred or arise *or arise* in or by the conduct, use, or operation of the said railroad, from and after the date hereof; and will promptly pay all interest that has or may become due from said party of the first part of any of its present indebtedness; and will also pay the principal of all such indebtedness whenever and as fast as the same shall become due, and will, and hereby
188 does, subject to the conditions hereinafter contained, assume and agree, during the continuance of this lease, to pay the debts, contracts, obligations, taxes, and liabilities heretofore made or incurred by or imposed upon said party of the first part, and to stand in its place in respect thereto.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said party of the second part, its successors and assigns, that it has full power and lawful authority to execute these presents, and that the said party of the second part, its successors and assigns, paying the said yearly rent afore reserved, and performing the covenants and agreements herein contained, on its part shall, and may at all times during the continuance of this lease, peaceable and quietly have, hold, possess, and enjoy the railroad property, rights, and effects hereby demised, and every part thereof, without any manner of let, suit, trouble, or hindrance of or from the party of the first part, its successors or assigns, or any other person or persons
189 whomsoever, lawfully claiming or to claim the same; and that the title to the property herein and hereby assigned, transferred, demised, or otherwise conveyed it will warrant and defend.

And the said party of the first part further covenants and agrees in manner aforesaid that it shall and will, from time to time during the continuance of this lease, make, execute, and deliver to the party of the second part, its successors and assigns, all and every such further and other leases, deeds, transfers, instruments in writing, and assurances as by said party of the second part, its successors and assigns, shall be reasonably desired or required for fully effectuating the objects, intents, and purposes of this lease, and of leasing the railroad and other property hereinbefore mentioned and hereby leased or intended so to be, and for more fully confirming and securing

unto the said party of the second part, its successors and assigns, all the rights and privileges hereinbefore mentioned and granted and secured, or intended so to be.

And the said party of the first part further covenants and agrees that it will, during the term of this demise, keep and continue
190 at the cost and expense of the said party of the second part, not exceeding, however, the annual sum of one thousand dollars, its legal organization; and also at all times, when thereunto reasonably required by the said party of the second part, do and perform, at the expense of the said party of the second part, all such reasonable acts, matters, and things as may be proper for the due protection, preservation, and enjoyment of the property hereby demised, and to carry into effect the true intent and meaning of this instrument, and in default thereof the same may be done by, but at the expense of, the said party of the second part, and therein the said party of the second part may use the name, power, and authority of the said party of the first part; and further, that the said party of the second part may at any time and in all places, at its own expense, use the corporate name of the party of the first part in any suits or proceedings wherein it shall be necessary or proper for the enforcement of its rights against third parties.

191 And the said party of the first part further, and in consideration of the premises, covenants and agrees to assign, and the said party of the first part does hereby assign and transfer to the party of the second part, its successors and assigns, all its estate, right, title, and interest in and to the following-described railroads, which have heretofore been granted, leased, and demised to it for the respective terms of years specified in the several indentures and contracts in writing entered into by the respective owners thereof and the said Pacific Railroad, viz:

The Missouri River Railroad, which was demised and leased to the said Pacific Railroad by an indenture or contract in writing, dated October 31st, A. D. eighteen hundred and sixty-five, for and during the term of twenty years from the first day of August, A. D. one thousand eight hundred and sixty-six.

The Leavenworth, Atchison and Northwestern Railroad, which was demised and leased to the said Pacific Railroad by an indenture or contract in writing, dated September 28, A. D. 1870, for
192 and during the term of twenty years from and after the first day of January, 1870.

The Boonville extension of the Osage Valley and Southern Kansas Railroad, which was demised and leased to the said Pacific Railroad by an indenture or contract made and entered into on the tenth day of February, A. D. 1868, for and during the term of thirty years from and after the fifteenth day of September, A. D. 1865.

The Lexington and St. Louis Railroad, which was demised and leased to the said Pacific Railroad by an indenture or contract in writing, entered into on the first day of December, A. D. 1869, for

and during the term of thirty years from and after the first day of September, A. D. 1870.

The St. Louis, Lawrence and Denver Railroad, which was demised and leased to the Pacific Railroad by an indenture or contract entered into on the 14th day of June, A. D. 1870, for and during the term of thirty years from and after the 1st day of August, A. D. 1871.

And it is further covenanted and agreed that the said At-
193 lantic and Pacific Railroad Company shall have, own, and enjoy the said several leased roads for and during the remainder or unexpired part of the terms of the respective leases, and that it shall in good faith carry out and perform each and every undertaking, obligation, contract, or duty required to be performed by the terms of said leases respectively by the said Pacific Railroad.

It is further understood and agreed by and between the parties hereto that the said Atlantic and Pacific Railroad company shall have the right and is hereby vested with full power and authority to construct, operate, and enjoy any and all lateral or branch roads, with the necessary station-houses and other buildings and structures *with* the Pacific Railroad might or could have constructed, operated, and enjoyed under and by virtue of its charter and the acts amendatory thereof, and for the purpose of securing and raising funds to construct such lateral or branch roads the said Atlantic and Pacific Railroad company shall have the right to place mortgages on each
194 of such branch railroads so constructed by it, for the amount of money necessarily expended in the construction of such branch railroads, which mortgages shall be and remain a first lien upon such branch roads until the sums of money so secured shall be fully paid and discharged.

It is further covenanted and agreed by and between the parties hereto that the said Atlantic and Pacific Railroad company shall have the right to borrow such sums of money at such rates of interest, and payable at such times as it shall deem proper, for the purpose of improving the said demised and leased premises, and increasing their usefulness, and for the purpose of paying the indebtedness of the said Pacific Railroad, herein specified, and hereby assumed by the party of the second part, and for the purpose of securing the payment of the money so borrowed, the said Atlantic and Pacific Railroad company shall have the right, and is hereby vested with full power and authority, to mortgage the demised and leased premises, or any part thereof, the lien of which said
195 mortgage or mortgages shall not be divested by any forfeiture of the estate and terms herein granted, demised and leased, but shall continue to be a valid and legal mortgage of and lien upon the whole of the estate and term herein granted, demised and leased, whether the same be forfeited or not.

It is further covenanted and agreed by and between the parties hereto that all bonds, notes, bills, moneys, choses in action, accounts, claims and demands, and assets and effects of every nature and kind whatsoever, of, belonging, or owing to the said Pacific Railroad, shall

be and the same are hereby assigned and transferred to the said Atlantic and Pacific Railroad company, and that full power and authority is hereby vested in it to enforce the collection of the same, and to appropriate the proceeds thereof to its own use and benefit.

It is further covenanted and agreed by and between the parties hereto that the said Atlantic and Pacific Railroad company is to have, and is hereby invested with full power and authority to sell and dispose
196 of any of the real estate herein granted, demised, and leased, as shall not be necessary for the convenient use and operation of said railroad, and to execute all necessary deeds of conveyance; to vest the title thereof in fee-simple in the purchaser or purchasers, and it shall have full power and authority to sell and dispose of any or all of the personal property herein demised, including the rolling stock, machinery, implements, material, supplies, tools, and other personal effects of any kind whatever, provided that no such personal property shall be thus sold and disposed of that may be required for the convenient and proper operation of said railroads, and that at the expiration of the term hereby granted, leased, and demised, the amount of such personal property of all kinds shall be equal in value to the amount now on hand and hereby demised, and the proceeds of all such sales shall be applied, at the option of the Atlantic and Pacific Railroad company, either to the reduction of the debt of the Pacific Railroad or to the purchase of materials for the use or improvement of the property hereby demised.

197 It is hereby further mutually covenanted and agreed, the said party of the second part may from time to time, at its own expense, make such alterations, improvements, and additions in, upon, or to the property hereby demised as may be proper for its full enjoyment for railroad purposes, and in case said party of the second part, for the more advantageous use of said demised property, at any time desire to acquire, obtain, or enjoy any additional lands, rights of way, or other property, said party of the first part, when thereto reasonably required and indemnified against all expense and damage therefrom, shall aid therein with its name, power, and authority, and in default thereof such name, power, and authority may be used by said party of the second part, after fully indemnifying the said party of the first part as aforesaid.

And it is hereby further mutually covenanted and agreed that the party of the second part, its successors and assigns, shall at all times during the continuance of this lease have the exclusive right
198 to manage and control the railroads and premises herein demised, and to regulate and determine the rates of passage-money, tolls, freights, and charges for all the transportation over the whole or any part of said railroads and premises, and shall also have full, free, and exclusive right to charge and collect all the passage-money, rents, tolls, freights and charges, and appropriate the same to its use; and shall have, use, exercise, and enjoy all the rights, power, and authority aforesaid, and all other corporate powers and privileges which can or may be lawfully exercised and enjoyed on or

about said demised railroads and premises, as fully, amply, and entirely as the same might or could have been used, exercised and enjoyed by the party of the first part if this instrument had not been made, and as exclusively, fully, amply, and entirely as the party of the first part have, or shall require authority by law, to grant the same; subject, nevertheless, at all times, to the restrictions and regulations imposed by law.

And it is hereby further mutually covenanted and agreed,
199 that in case the party of the second part shall at any time hereafter desire to enlarge the capacity of the said railroads, or either of them hereby demised, by increasing the tra[c]ks or extending the lines of said roads, by the acquisition of a depot grounds, the construction of depots, or otherwise improving its depot accommodation and transportation facilities by such means, the purchase of additional rolling stock, or otherwise, then in that case the party of the first part, its successors or assigns, will make, execute, and deliver to the party of the second part, its successors or assigns, its bonds, in such forms and for such amounts, and payable at such times, and secured by mortgage or otherwise, as the party of the second part may require; and which bonds shall be delivered to and negotiated by said party of the second part, and the proceeds and money received therefrom shall be received by it and be used and applied as far as necessary in making such enlargements and improvements, and in equipping and stocking said roads; and
200 any surplus, not so required, shall be applied to the payment of the indebtedness of said Pacific Railroad hereinbefore mentioned; and the party of the second part shall and will hereafter pay to the holders of such bonds the interest thereon; and the said party of the first part covenants and agrees that it, its successors or assigns, shall not nor will make nor issue any bonds or stock, or create any obligation, debt, or liability, for any purpose whatever, beyond that already issued and now in existence, as hereinbefore stated, except as hereinbefore provided, without the consent in writing of the party of the second part, its successors or assigns.

And it is hereby further mutually covenanted and agreed, that in case default shall be made in the payment of interests and dividends on the bonds and stock aforesaid, or the principal of any mortgage indebtedness, and the same or any part thereof shall remain unpaid for the space of sixty days from and after the time when the same shall become due and payable, and after demand therefor,
201 then the said party of the first part may at once enter upon and take possession of all the property hereby leased, and all depots, shops, buildings, tracks, and other permanent property or rolling stock added thereto, and the party of the second part will not unlawfully hinder or prevent such entry, nor the taking possession and using of all the said property by the party of the first part for its own benefit and use, and this lease shall terminate upon the party of the first part so taking possession of the demised premises; provided, however, that in case the party of the second part shall be unavoid-

ably restrained by injunction or by law, (not obtained by or upon their own action,) from paying the aforesaid rent and performing the covenants herein contained, or any of them, then and in that case the time during which the party of the second part shall be so restrained shall not be taken or considered as any part of the aforesaid ninety days.

It is further agreed that the books and accounts kept by the said Atlantic and Pacific Railroad company of the operation and
202 business of the demised premises shall at all reasonable hours and times be open to the inspection and examination of the officers of said Pacific Railroad, or of such person or persons as they may appoint from time to time to examine the same.

And further, that each and all of the preceding covenants, agreements, and stipulations shall mutually bind and inure to the benefit of the said Pacific Railroad and the said Atlantic and Pacific Railroad company, their and each of their successors and assigns.

And provided further that in case this lease shall be terminated in such manner, or in any other manner before the expiration of the full term hereby created, all covenants and agreements herein contained on the part of the party of the second part to pay, and all obligations and liability of the said party of the second part to pay the bonds or other indebtedness of the said party of the first part, or the interest or dividends hereinbefore mentioned that may there-
203 after accrue, and all guarantees entered into by it, and all other covenants and agreements herein contained, and any liability or obligation, howsoever created, to pay any moneys to or for or on account of the said party of the first part, or under this lease, shall cease and become extinguished thereafter; and in such case all moneys expended by the party of the second part, under and in pursuance of this lease, in the purchase of real estate or of rolling stock, the increase of tracks, or the extension of the lines of said road, or in otherwise improving the railroads and property herein demised, deducting such portion thereof as may have been derived from the property demised, shall be refunded and repaid to the said party of the second part.

It is further agreed that in case any of the stockholders of the said corporations, parties of the first and seconds parts hereto, who are registered as such on the books of the respective companies, shall, within three months from the delivery hereof, refuse to give
204 their assent to this lease, and shall notify the corporation of which they are shareholders of such refusal, then and in that case the party of the second part shall and will, on demand, make compensation to said stockholders for the stock so owned by them, respectively, by paying to said parties the value of said stock, which value, unless agreed upon, may, if said stockholder consent, be ascertained by three referees, who, unless agreed upon by the parties, shall be appointed by the presiding judge of the circuit court of St. Louis county, Missouri.

In witness whereof the parties hereto have respectively caused

these instruments to be signed by the presidents and secretaries of said respective corporations, and the seals of said respective corporations to be hereunto affixed; all of which has been done in pursuance of the authority of the board of directors of the said corporations respectively.

[SEAL.] JOSEPH BROWN,
President Pacific Railroad Co.

205 JOHN C. PORTER,
Secretary P. R. R.

ANDREW PIERCE, JR.,
[SEAL.] *President Atlantic and Pacific R. R. Co.*

URIEL CROCKER,
Vice-President South Pacific Railroad Company.

WM. A. HAYES,
Secretary Atlantic and Pacific Railroad.

206 *Exhibit D.*—Attached to complaint of Peter Nugent.

Copy of trust deed to Vail and Fish, made July 10th, 1875, known as the third mortgage.

This indenture, made the tenth day of July, in the year eighteen hundred and seventy-five, between the Pacific Railroad of Missouri, a corporation created and organized under and in pursuance of the laws of the state of Missouri, party of the first part, and Henry F. Vail and James D. Fish, of the city and state of New York, parties of the second part.

Whereas the said party of the first part is authorized and empowered by the laws of the state of Missouri, from time to time to borrow such sums of money as may be necessary for the completion and operation of its railroad, and to issue and dispose of its bonds for the amount so borrowed;

And whereas by the terms of a lease bearing date the twenty-ninth day of June, eighteen hundred and seventy-two, under which all the railroads owned and operated by the said party of the first part were demised to the Atlantic and Pacific Railroad company, a cor-
207 poration created and organized under the laws of the United States, it was provided that the said party of the first part should, from time to time, issue its bonds for such amount and for such time as might be requested by the said Atlantic and Pacific Railroad company, said bonds to be used in the liquidation of the indebtedness of the said party of the first part, and in permanently improving and extending its railroad.

And whereas in compliance with the terms of said lease, and for the purposes aforesaid, the said party of the first part heretofore issued its bonds amounting in the aggregate to the principal sum of one million five hundred thousand dollars, and designated as "income bonds," of which bonds one thousand numbered from one to one thousand, both inclusive, are of the denomination of one thou-

sand dollars each; eight hundred numbered from one thousand and one to eighteen hundred, both inclusive, are of the denomination of five hundred dollars each; and one thousand numbered from eighteen hundred and one to twenty-eight hundred, both in-
208 clusive, are of the denomination of one hundred dollars each; all of which bonds bear date the second day of September, in the year eighteen hundred and seventy-two;

And whereas, in compliance with the terms of said lease and for the purposes aforesaid, the said party of the first part afterwards made a further issue of its bonds amounting in the aggregate to the principal sum of two million dollars, and designated as "improvement bonds," which said last-mentioned bonds numbered from one to two thousand, both inclusive, are of the denomination of one thousand dollars each, and all bear the fifteenth day of December, in the year eighteen hundred and seventy-four;

And whereas at the request of the said Atlantic and Pacific Railroad company, the said party of the first part is desirous of calling in and retiring all the said *said* bonds so issued by it and designated as "income bonds" and "improvement bonds," by issuing other of its bonds in exchange therefor respectively, and also of borrowing additional sums of money by the issue of other of its
209 bonds, for the future permanent improvement of its railroads;

And whereas by resolutions adopted at meetings of the board of directors and of the stockholders of the said Atlantic and Pacific Railroad company, duly convened and constituted and respectively held on the twenty-fourth day of June and on the 10th day of July, A. D. eighteen hundred and seventy five, the said party of the first part has been requested in substance and legal effect to execute and deliver to the said Atlantic and Pacific Railroad company for the purposes above mentioned, the corporate bonds of the said party of the first part to the amount of four million of dollars, payable in twenty years from the first day of May, A. D. eighteen hundred and seventy-five, in the lawful money of the United States, with interest at the rate of seven per cent. per annum, payable semi-annually, at the office or agency of the said Atlantic and Pacific Railroad company in the city of New York, said bonds to be secured by
210 mortgage on all the railroad, equipment, and real estate belonging to the said party of the first part, and to be guaranteed, principal and interest, by the said Atlantic and Pacific Railroad company;

And whereas in pursuance of such request the board of directors of said Pacific Railroad (of Missouri), the party hereto of the first part, at a meeting thereof duly convened and held on the twenty-fourth day of June, A. D. eighteen hundred and seventy-five, resolved, in substance and legal effect, that the said party of the first part may execute and issue under its corporate seal for the purposes aforesaid four thousand of its corporate bonds, each for the sum of one thousand dollars and for the aggregate amount of four million

dollars, bearing even date herewith, severally payable to the said Henry F. Vail and James D. Fish, the parties hereto of the second part, or bearer, on the first day of May, in the year eighteen hundred and ninety-five, at the office or agency of the Atlantic and Pacific Railroad company in the city of New York, in lawful money
211 of the United States, with interest thereon at the rate of seven per cent. per annum, from the first day of May, in the year eighteen hundred and seventy-five, payable in like lawful money semi-annually, on the first days of November and May in each year, on presentation of the interest warrants annexed to said bonds respectively, at the office or agency aforesaid, the said bonds to be guaranteed by the said Atlantic and Pacific Railroad company; that the said bonds be valid only when countersigned by the said parties of the second part, and that they be numbered from one to four thousand, both inclusive, and that said bonds should be secured by a mortgage upon the property and effects hereinafter specifically described, which said mortgage should be executed on behalf of the said party of the first part by its president and treasurer;

And whereas such resolution of the board of directors of the said party of the first has been duly ratified, and the issue of the
212 bonds therein referred to has been duly authorized by the vote of a majority of the existing capital stock of the said party of the first part at a stockholders' meeting duly called for that purpose, and held on the tenth day of July, A. D. eighteen hundred and seventy-five;

And whereas in pursuance of the authority so conferred upon it as aforesaid the said party of the first part has made and executed said bonds, each of which said bonds is in form following, that is to say:

No. United States of America. $1,000.

The Pacific Railroad (of Missouri.)

Third Mortgage Bond.

The Pacific Railroad (of Missouri) acknowledges to owe and promises to pay to Henry F. Vail and James D. Fish, or bearer, one thousand dollars in lawful money of the United States, at the office or agency of the Atlantic and Pacific Railroad company in the city of New York, on the first day of May, A. D. one thousand eight hundred and ninety-five, and the interest thereon at the rate of seven per cent. per annum, on the first day of May,
213 A. D. one thousand eight hundred and seventy-five, in like lawful money, semi-annually, on the first days of November and May in each year, on the presentation of the annexed interest warrants at the office or agency aforesaid.

This is one of a series of four thousand bonds each of the denomination of one thousand dollars, and numbered from one to four thousand inclusive, secured by a mortgage of even date herewith, conveying to the above-named Henry F. Vail and James D. Fish,

in trust for the holders of said bonds, the Pacific Railroad (of Missouri), with its franchises and appurtenances, including rolling stock, machine shops, and depots and real estate extending from the depot at Seventh street, in the city of St. Louis, two hundred and eighty-three miles to the western boundary of the state of Missouri, at Kansas City; also the branch railroad of the said Pacific Railroad (of Missouri,) which connects with and intersects the main line of the road at Kirkwood, and extending from the point of such intersection to the Mississippi river at Carondelet, in said state of
214 Missouri, together with all the appurtenances thereunto belonging, including depots, engine houses and water stations, and the lands acquired at or near Carondelet aforesaid.

This bond may be registered in the books of the said Pacific Railroad (of Missouri) at the option of the holder, after which no transfer thereof shall be made except by an endorsement thereon, to be made by an authorized agent of said company, unless such transfer so made shall be to bearer, in which case it may thereafter pass delivery.

This bond is to be valid only when authenticated by a certificate endorsed thereon, signed by the said trustees.

In witness whereof the said Pacific Railroad (of Missouri) hath caused this bond to be executed by its president and treasurer, and its corporate seal to be thereto affixed this tenth day of July, one thousand eight hundred and seventy-five.

[L. S.] *Treasurer.* *President.*

And each of said bonds has or will have endorsed upon it
215 a certificate signed by the parties hereto of the second part, in the following words, that is to say:

"We hereby certify that this is one of the issue of bonds mentioned in the mortgage executed by the Pacific Railroad (of Missouri) to us, within referred to, dated July 10, 1875, and intended to be secured thereby."

Now, therefore, this indenture witnesseth, that the said Pacific Railroad company (of Missouri,) by virtue of the power granted by the laws of Missouri aforesaid, and for the purpose of securing the payment of the principal and interest of the said bonds and each of them, and in consideration of one dollar in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, conveyed, and confirmed, and by these presents doth grant, bargain, sell, assign, transfer, and set over, convey, and confirm unto the said Henry F. Vail and James D. Fish, the parties of the second part, as trustees, and in trust and to their successor or successors, all
216 and singular the entire line of the Pacific Railroad (of Missouri), two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, state of Missouri, to the western boundary of said state, at Kansas city,

and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Monitean, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said state of Missouri, with its appurtenances, including the real estate, depots, stations, machine shops, rolling stock, machinery, rights, interests, and franchises of the said railroad, subject however to two several mortgages upon the property aforesaid, heretofore executed, one of which said mortgages was executed and delivered by the said party of the first part to Uriel A. Murdock, James Punnett, and Luther C. Clark, of the city of New York, trustees, to secure the payment of seven thousand bonds of one thousand dollars each, bearing date July 15, 1868, and payable twenty years after date, and the other of which said mortgages was executed and
217 delivered by the said party of the first part to Edwin D. Morgan and Joseph Seligman, of said city of New York, trustees, to secure the payment of three thousand bonds of one thousand dollars each, bearing date the first day of July, A. D. 1871, and payable twenty years after date.

Also all and singular the following described real estate in the city of St. Louis, state of Missouri, viz:

Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block numbered two hundred and thirteen of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block sixty-six feet eight inches in Fourteenth street by one hundred feet in Austin street.

218 Also the following described real estate in city block number four hundred and thirty-eight, viz: Beginning at the northwest corner of Eleventh and Cerre streets, in the city of St. Louis, the southeast corner of said block; thence west 'long the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east parallel to Cerre street, and one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also the following described tract or parcel of land, viz:
219 Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth

and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block 439; thence along the south line of Cerre street to the place of beginning.

Subject, however, to a mortgage dated the nineteenth day of April, A. D. eighteen hundred and seventy-two, upon the said *rail* estate, heretofore executed and delivered by the said party of the first part to Rufus J. Lackland and Dwight Durkee, as trustees, to secure the payment of six hundred coupon bonds of one thousand dollars each, and four hundred coupon bonds of five hundred dollars each, bearing date the first day of May, A. D. 1872.

Also all and singular the branch railroad of the said party of the first part, constructed and operated and extending from a point on the main line of the railroad of the said party of the first part at or near Kirkwood, thence to the termination of the said railroad
220 at the Mississippi river at Carondolet or South St. Louis, with its appurtenances, including the depots, stations, machine shops, superstructures and erections on the line of said branch railroad, or at Carondolet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired and appropriated, for depots, engine houses, car houses, warehouses, machine shops or other superstructures and erections on the line of said branch railroad or at Carondolet aforesaid; subject, however, to a first mortgage upon the said property herein lastly described, heretofore executed and delivered by the said party of the first part to Jesse Seligman and James Baker, of the city of New York, trustees, to secure the payment of five hundred bonds of one thousand dollars each, bearing date the 1st day of October, A. D. 1873, and payable twenty years after date; to have and to hold all and singular the said railroad, real estate and branch railroad, together with all the property, franchises, and appurtenances to them severally belonging as herein described, unto the said Henry F. Vail and James D. Fish, and their successors and assigns forever, in
221 trust, nevertheless, for the uses, intents, and purposes hereinafter expressed and declared of and concerning the same, that is to say:

First. No one of said bonds shall be deemed issued or be valid or secured by this mortgage until there shall have been endorsed upon it a certificate duly signed by the parties of the second part, their successor or successors in this trust, in the following words:

"We hereby certify that this is one of the issues of bonds mentioned in the mortgage executed by the Pacific Railroad (of Missouri) to us, within referred to, dated July 10th, 1875, and intended to be secured thereby."

Second. Fifteen hundred of said bonds, being those numbered from one to fifteen hundred, both inclusive, shall be issued and used only in exchange for or for the purpose of retiring the said bonds of

the said party of the first part now outstanding, and designated as "income bonds," as herein above recited.

Third. Two thousand of said bonds, being those numbered from fifteen hundred and one to thirty-five hundred, both inclusive,
222 shall be issued and used only in exchange for the said bonds of the said party of the first part now outstanding and designated as "improvement bonds," as herein above recited.

Fourth. Whenever any one of the said outstanding bonds shall have so *rec'red* by the said parties of the second part, their successor or successors in this trust, in exchange for or for the purpose of retiring the same, it shall be registered as an exchanged or retired bond, together with the date of such transaction, the name of the person from whom it was received, and the number of the bond given in exchange for or in 'der to retire the same, and shall be safely kept until all the bonds or like description shall have been in like manner exchanged or retired; and thereupon the bonds so received in exchange or retired shall be cancelled by the said party of the second part, their successor or successors in this trust, and delivered to the said party of the first part. And the books of registry of the bonds so exchanged or retired shall be kept open for the examination and inspection of any party in interest at all reasonable times.

223 Fifth. The remaining five hundred of said bonds, being those numbered from thirty-five hundred and one to four thousand, both inclusive, shall be issued forthwith and delivered to the said party of the first part.

And this indenture is upon the express condition, that if said party of the first part shall well and truly pay, or cause to be paid, to the holder or holders of the said bonds, the principal sums of money therein mentioned, according to the true intent and meaning thereon, with the interest thereon, according to the terms and conditions thereof, then and in that case the lien or incumbrance hereby created for the security and payment thereof, and all the estate and interest of the parties of the second part in the property aforesaid, shall cease and determine; and at the request of the said party of the first part, or its assigns, this deed of trust or mortgage shall be satisfied, and a release and satisfaction thereof shall be entered of record at the cost of the party of the first part.

But if the said party of the first part shall fail to pay or
224 cause to be paid the interest on any of the said bonds intended to be secured hereby for six months after the same shall become due and payable, and after demand for the payment of same at the office or agency of the Atlantic and Pacific Railroad company in the city of New York, or if the principal sum of any of the said bonds when and as the same shall become due and payable shall not be paid for the period of six months after demand made for the payment of same at the said office or agency in the city of New York as aforesaid, the said parties of the second part, and their survivor or survivors, successor or successors in this trust,

are authorized and required upon the written request of the holder of bonds to the amount of five hundred thousand dollars, the principal or interest of which shall be then in arrear and unpaid, to offer for sale the said railroad and branch railroad, with all the property herein conveyed, and to sell the same at public vendue to the highest bidder at the court house in the city of St. Louis, first giving ninety days' notice thereof and of the time, place and terms of sale,
225 by notice published weekly, or oftener, in at least one paper published in each of the cities of St. Louis, Philadelphia, New York and Boston, the said trustees being hereby authorized to adjourn said sale from time to time in their discretion, and if so adjourned to make the sale without further notice, at the time and place to which the same may be so adjourned; and upon such sale the said Henry F. Vail and James D. Fish, or the survivor of them, and his or their successor or successors, are hereby authorized to receive the bonds issued by the party of the first part, and hereby secured in payment from any purchaser or purchasers, at their pro rata value at the option of the holders thereof, and said trustees are hereby also irrevocably empowered in such sale to make, execute, and deliver any conveyance or conveyances that may be necessary to completely transfer and convey all the property hereby mortgaged to the purchaser or purchasers, who may immediately enter upon and take possession of the same, and all benefit and equity of redemption of the said Pacific Railroad therein shall be for-
226 ever barred.

And the said party of second part, after the payment of the costs and expenses of this trust and sale, including such just allowances for attorney and counsel fees and all other expenses, advances or liabilities made or incurred by the said trustees in respect to the mortgaged property or in performance of any of the trusts herein contained, together with reasonable compensation for their services in the execution of this trust and the discharge of the duties hereby devolved, shall apply the remaining proceeds of said sale to the payment of the interest which shall have at that time accrued on said bonds or so many of them as shall have been issued and be then outstanding, pro rata, until all such interest be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid, and shall pay over the surplus, if any, to the party of the first part, its successors or assigns.

It is further mutually agreed that the actual possession, use
227 and management of the said railroad and branch railroad, with all and singular the appurtenances thereto belonging, respectively, shall be and remain with the party of the first part so long as there shall be no default in the payment of interest or principal in the manner aforesaid of the said bonds hereby secured.

It is hereby further agreed that whenever a vacancy shall exist in the office of trustee hereby created, the surviving or continuing trustee, if any, shall during such vacancy be competent to exercise all the powers by these presents granted or conferred upon the parties

of the second part, and that either of the said trustees or any successor may resign or discharge himself of the trust hereby created by notice in writing to the company three months before such resignation shall take effect, or by notice in writing previously given for any shorter time if the said company agree thereto, and in case either of the said trustees or any trustee hereafter substituted shall die or resign or become inca'ble or unfit to act as such, a successor shall be appointed by the company, and the trustee so appointed, with the surviving
228 or continuing trustee, shall be vested with all the powers, authority, and estates conferred upon the parties of the second part hereby; and upon the resigning, or removal by any court of competent jurisdiction, of any trustee, or upon appointment or substitution of another trustee in his place, by virtue hereof, all the power and authority of such trustee shall cease: Provided, further, that in case a successor to fill any vacancy which may have happened in said trust shall not be made within a reasonable time, application, in behalf of the holders of the bonds secured hereby, may be made by the surviving trustee, or by the holders of the bonds secured hereby, to the aggregate amount of two hundred and fifty thousand dollars, to any court of competent jurisdiction, for the appointment of a new trustee or new trustees, and the trustee or trustees, when so appointed, shall become vested with all the powers, authorities, and estates hereby granted to or conferred upon the parties of the second part.

The said party of the first part, agrees to pay all ordinary
229 and extraordinary taxes, assessments, and other public burdens and charges, which shall or may be imposed upon the property herein conveyed, and in case of the default of the said party of the first part in this behalf, the parties of the second part, the survivors of them or their successors in this trust, may pay and discharge the same, and the sums so paid, with interest, shall be paid out of the proceeds of the sale of said property and franchises, as hereinbefore provided.

And the party of the first part, in consideration aforesaid, further agrees with the parties of the second part, their successors and assigns, to execute and deliver such further deeds, covenants and assurances as may be necessary or proper to carry out the object and purposes of this instrument.

And it is further agreed that the parties of the second part, and the survivors of them, and their successors in this trust, shall be accountable only for reasonable care and diligence in the performance of the trust hereby created, and that neither of said trustees shall be responsible for any default or misconduct of the other; and
230 the parties of the second part accept the trusts created and declared hereby and agree to discharge the same in pursuance of the provisions in that behalf herein contained.

In witness whereof the said Pacific Railroad (of Missouri) hath caused these presents to be signed by its president and treasurer, and its corporate seal to be hereunto affixed, and the parties of the second

part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of—

J. L. DEARBORN, *Treasurer.* [SEAL.]
[SEAL.] HENRY F. VAIL. [SEAL.]
JAMES D. FISH. [SEAL.]

Sealed and delivered in presence of—
THOS. L. HARNESS, to SAMUEL HAYS.
E. G. CHADWICK, to J. L. DEARBORN.
GEO. BUTLER, to H. F. VAIL and J. D. FISH.

231 *Exhibit E.*

Copy of circular issued to procure proxies for voting for the third mortgage bond of $4,000,000.

OFFICE OF THE PACIFIC RAILROAD (OF MISSOURI),
ST. LOUIS, *July 1st*, 1875.

To the STOCKHOLDERS:

The directors, on the 24th ulto., authorized the issue of bonds in the sum of $4,000,000, to be issued in redeeming for cancellation $1,500,000 income bonds and $2,000,000 improvement bonds heretofore issued; also for the redemption and cancellation of the second mortgage bonds of the Pacific Railroad, as in said second mortgage provided, and for payment of floating liabilities created on account of this company by the Atlantic and Pacific Railroad in permanently improving the Pacific Railroad. A special meeting of the stockholders, to whom will be submitted this action of the directors for approval, (as is required by the statutes of Missouri,) will be held at the office of the Atlantic and Pacific Railroad company, in the city of St. Louis, on Saturday, July 10th, 1875, at 10 o'clock a. m. Your attendance is respectfully requested. If inconvenient for you
232 to represent your shares in person at the special meeting, will you please sign the proxy hereto attached, and deliver to Andrew Pierce, esq., president of the Atlantic and Pacific Railroad company, and oblige,

Very truly yours,

SAMUEL HAYS,
President.

Copy of proxy enclosed in foregoing circular, and signed by same stockholders.

Know all men by these presents that , stockholder in the Pacific Railroad (of Missouri), owner of shares, have made, constituted, and appointed of , lawful agent and attorney for , and in name to appear at a special meeting of the stockholders of said Pacific Railroad (of Missouri), to be held in the city of St. Louis on the tenth day of July, A. D. 1875, for the purpose of votlng upon

the action of the directors of said Pacific Railroad in authorizing the issue of four million dollars ($4,000,000) of bonds, and for the transaction of any other business which may come before said meeting, or at any adjournment thereof, and then and there, for and in name, to cast the vote to which entitled as stockholder, and which might cast if present.

233 Witness and seal this day of , A. D. 1875.

Witness . [SEAL.]

And afterwards, to wit, one the 20th day of September, 1880, there was filed the following demurrer to said bill, which said demurrer is in the words and figures following, to wit:

Demurrer to Bill of Complainant.

In the circuit court of the United States for the eastern district of Missouri.

The Pacific Railroad (of Missouri), complainant, *vs.* The Missouri Pacific Railway Company et al., defendants. } In Equity.

Demurrer to the Bill of Complaint.

The defendants, the Missouri Pacific Railway company, Oliver Garrison, D. R. Garrison, Webb M. Samuels, and James Baker, by protestation, not confessing all or any of the matters or things
234 in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not by its said bill made such a case as entitles it in a court of equity to any discovery from these defendants, respectively, or any of them, or any relief against them as to the matters contained in said bill, or any such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. And for further and more specific grounds of demurrer these defendants aver as follows, to wit:

I.

If or in so far as the said bill of complaint is to be treated and regarded as a bill of review for errors apparent in the record, then it clearly appears that the time limited by law for the bringing of such a bill of review had elapsed long prior

to the bringing of the present suit; and also that said
235 decree has been affirmed on appeal by the supreme court of the United States. If or in so far as the said bill of complaint is to be regarded and treated as a bill of review instituted upon the discovery of new matter or based upon errors not apparent of record, then it appears that no leave of this court has been obtained for the filing of such a bill of review. It does not appear in the bill of complaint or otherwise that the matters of complaint therein set forth were not known to the complainant at the time of the pendency of the foreclosure, or that they could not have been therein set forth or determined; and the bill of complaint discloses such negligence and laches in the institution of the suit as destroys complainant's right to the relief prayed for.

II.

This bill of complaint contains no description of the property mortgaged or covered by the decree, and in reference to which relief is sought to be had.

III.

The bill of complaint fails to set forth the bill of complaint or the decree in the proceeding sought to be assailed, or the tenor or purport thereof, all of which things should appear in the body of
236 the bill of complaint in order to entitle the complainant to any relief or discovery.

IV.

The averments of the bill of complaint show that the complainant, even if its bill is to be treated as an original one and not a bill of review, should be precluded by its own laches and neglect from now instituting the present proceeding; for it is nowhere averred that the complainant or its stockholders were at any time ignorant of the various alleged frauds complained of; and on the other hand it does appear that the complainant and its stockholders were all along aware of all the facts now sought to be assigned as grounds for relief and discovery in the bill, and that the complainant could have instituted its suit under the authority of the officers now representing it, as early as March, 1877, and that the stockholders of complainant had the means and remedies to have averted the alleged wrongs, as well as the rendering of the decree and the foreclosure of the property now complained of, in so far as they may have had any just defences thereto.

237 V.

It affirmatively appears by said bill of complaint, in conjunction with the exhibits sought to be made a part thereof, that the said stockholders of the complainant, having full knowledge of all the matters now sought to be set up as grounds of relief and discovery

in this case, were allowed full opportunity to interpose any and all objections they might have to the rendering of said decree, and not only failed to do so, but actually assented to said decree in manner and form as it was rendered, and that the said stockholders actually assented to and ratified the sale of the property, which was made under and by virtue of the foreclosure proceedings.

VI.

The bill of complainant fails to aver that its stockholders were at the time ignorant of the various facts alleged as accruing and existing prior to the foreclosure suit or during the pendency of said suit, or that they were in any way precluded from making any defences that they might have to said decree of foreclosure, all which averments, under the facts and circumstances of this case, should be
238 made to appear by the bill of complainant in order to entitle it to any relief or discovery.

VII.

The said bill of complaint is altogether vague, uncertain, and inconsistent in its various averments, and abounds in prolix, redundant, and impertinent matters, and it is not such a bill as under the course of proceedings in chancery and of this court these defendants ought to be called upon to make plea or answer to.

VIII.

There is a defect of material and necessary parties defendant in said suit; for it appears from said bill of complaint that in order to the obtaining of the relief sought for, J. B. Colgate & Co., D. L. Caldwell, the National Bank of Commerce of New York, the National Shoe and Leather Bank, Andrew Pierce, as well as other corporations and individuals, and especially the officers of the Atlantic and Pacific Railroad company at the time of the perpetration of the alleged frauds, and the former officers of the Pacific Railroad, are necessary and proper parties to the suit in order to the obtaining of the relief sought to be had in the bill of complaint.

239 IX.

The thirty-fourth, thirty-seventh, thirty-eight, thirty-ninth, fortieth, forty-first, and forty-second clauses of the bill of complaint contain matters and allegations that are entirely immaterial and irrelevant, and all of which have been adjudicated against the complainant, on appeal, by the supreme court of the United States.

X.

The defendants Oliver Garrison, D. R. Garrison, and Webb M. Samuels, for further ground of demurrer in their severals behalfs, say that they and each of them are in no way proper or necessary parties to the said bill of complaint, or to this suit.

Wherefore, and for divers other good causes for demurrer appear-

ing in said bill, these defendants do demur thereto, and pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to said bill; and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

MISSOURI PACIFIC RAILWAY CO.,
By THOMAS J. PORTIS, *its Attorney.*
OLIVER GARRISON,
240 D. R. GARRISON,
WEBB M. SAMUEL, AND
JAMES BAKER,
By CLINE, JAMIESON & DAY,
their Attorneys.

CLINE, JAMIESON & DAY,
Counsel for all of Demurring Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

MELVILLE C. DAY.

Affidavit waived.

GLOVER & SHEPLEY,
Sols. for Complainants.

And afterwards, to wit, on the 17th day of December, A. D. 1880, the following further demurrer to the bill of complaint was filed in said cause in the words and figures following, to wit:

241 In the circuit court of the United States for the eastern district of Missouri.

The Pacific Railroad (of Missouri,) complainant,
vs.
The Missouri Pacific Railroad Company, C. K. Garrison et al., defendants. } In Equity.

Demurrer to the bill of complaint.

The defendants George E. Ketchum, C. K. Garrison, and Thomas W Pierce and Joseph L. Stephens, by protestation, not confessing all or any of the matters or things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not, by its said bill, made such a case as entitles it, in a court of equity, to any discovery from from these defendants respectively, or any of them, or any relief against them as to the matters contained in said bill, or any such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of avail to the said complainant for

any of the purposes for which a discovery is sought against
242 these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of.

And for further and more specific grounds of demurrer these defendants aver as follows, to wit:

I.

If or in so far as the said bill of complaint is to be treated and regarded as a bill of review for errors apparent in the record, then it clearly appears that the time limited by law for the bringing of such a bill of review had elapsed long prior to the bringing of the present suit; and also that said decree has been affirmed on appeal by the supreme court of the United States. If or in so far as the said bill of complaint is to be regarded and treated as a bill of review instituted upon the discovery of new matter or based upon errors not appeared of record, then it appears that no leave of this court has been obtained for the filing of such a bill of review. It does not appear in the bill of complaint, or otherwise, that the matters of complaint therein set forth were not known to the complainant at the time of the pendency of the foreclosure suit, or that they could not have been therein set forth or determined, and the bill of complaint discloses such negligence and laches in the institution of the suit
243 as destroys complainant's right to the relief prayed for.

II.

The bill of complaint contains no description of the property mortgaged or covered by the decree, and in reference to which relief is sought to be had.

III.

The bill of complaint fails to set forth the bill of complaint or the decree in the proceeding sought to be assailed, or the tenor or purposes thereof, all of which things should appear in the body of the bill of complaint in order to entitle the complainant to any relief or discovery.

IV.

The averments of the bill of complaint show that the complainant, even if its bill is to be treated as an original one and not a bill of review, should be precluded by its own laches and neglect from now instituting the present proceedings, for it is nowhere averred that the complainant or its stockholders were at any time ignorant of the various alleged frauds complained of; and, on the other hand, it does appear that the complainant and its stockholders were all along aware of all the facts now sought to be assigned as grounds for relief and discovery in the bill, and that the complainant could have instituted its suit under the authority of the officers now
244 representing it as early as March, 1877, and that the stockholders of complainant had the means and remedies to have

averted the alleged wrongs, as well as the rendering of the decree and the foreclosure of the property now complained of, in so far as they may have had any just defences thereto.

V.

It affirmatively appears by said bill of complaint, in conjunction with the exhibits sought to be made a part thereof, that the said stockholders of the complainant, having full knowledge of all the matters now sought to be set up as grounds of relief and discovery in this case, were allowed full opportunity to interpose any and all objections they might have to the rendering of said decree, and not only failed to do so, but actually assented to said decree in manner and form as it was rendered, and that the said stockholders actually assented to and ratified the sale of the property which was made under and by virtue of the foreclosure proceedings.

VI.

The bill of complainant fails to aver that its stockholders were at the time ignorant of the various facts alleged as occurring and
245 existing prior to the foreclosure suit, or during the pendency of said suit, or that they were in any way precluded from making any defences that they might have to said decree of foreclosure; all which averments, under the facts and circumstances of the case should be made to appear by the bill of complainant in order to entitle it to any relief or discovery.

VII.

The said bill of complaint is altogether vague, uncertain, and inconsistent in its various averments, and abounds in prolix, redundant and impertinent matters; and it is not such a bill as under the cause of proceedings in chancery and of this court these defendants ought to be called upon to make plea or answer to.

VIII.

There is a defect of material and necessary parties defendant in said suit, for it appears from said bill of complaint that in order to the obtaining of the relief sought for J. B. Colgate & Co., D. L. Caldwell, the National Bank of Commerce of New York, the National Shoe and Leather Bank, Andrew Pierce, as well as the corporations and individuals, and especially the officers of the Atlantic and Pacific Railroad company at the time of the perpetration of alleged frauds, and the former officers of the Pacific Railroad, are necessary and proper parties to the suit, in order to the obtaining of the relief sought to be had in the bill of complaint.

IX.

The thirty-fourth, thirty-seventh, thirty-eighth, thirty-ninth,
246 fortieth, forty-first, and forty-second clauses of the bill of complaint contains matters and obligations that are entirely im-

material and irrelevant, and all of which have been adjudicated against the complainant, on appeal, by the supreme court of the United States.

X.

This court has no jurisdiction over this suit.

Wherefore, and for divers other good causes for demurrer appearing in said bill, these defendants do demur thereto, and pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to said bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

CLINE, JAMISON & DAY,
Counsel for Geo. E. Ketchum,
C. K. Garrison and Thomas W. Pierce.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

MELVILLE C. DAY.

Affidavit waived.

GLOVER & SHEPLEY.

247 And afterwards, to wit, on the 31st day of March, A. D. 1881, at a regular stated term of the circuit court of the United States in and for the eastern district of Missouri, the following further proceedings were had and appear of record in said cause, to wit:

Demurrers Sustained.

Pacific Railroad (of Missouri), complainant,
vs.
Missouri Pacific Railway Company et al., defendants.

The demurrers of respondents to the bill of complaint herein came on to be heard at this term and were argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that said demurrers be, and the same are hereby, sustained.

And afterwards, to wit, at said term of court, and on the 18th day of April, A. D. 1881, the following further proceedings were had and appear of record in said cause, to wit:

248 *Further Order as to Demurrers.*

Pacific Railroad (of Missouri), complainant,
vs.
Missouri Pacific Railway Company et al., defendants.

Now comes the Central Trust Company and files substitution o

Cline, Jamison and Day as its solicitors, and by leave withdraws its answer, and by consent the demurrers of the other respondents to the bill of complaint are ordered to stand as demurrers for said Central Trust Company to said bill.

And thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that said demurrer be, and the same is, sustained.

And the said complainant, by its solicitors, electing to abide by its said bill, it is now ordered, adjudged, and decreed that said bill of complaint be, and the same is, dismissed, with costs to the defendants to be taxed.

And thereupon said complainant gives notice of appeal.

And afterwards, to wit, at said term of court, and on
249 the second day of May, A. D. 1881, the following further proceedings were had and appear of record in said cause, to wit:

Appeal.

Pacific Railroad (of Missouri), complainant,
vs.
Missouri Pacific Railroad Co. et al., defendants.

Now comes the complainant, by its solicitors, and presents to the court its appeal bond herein in the sum of $500.00, and prays an appeal from the decree of this court to the supreme court of the United States; and thereupon said bond is approved and filed, and said appeal allowed as prayed.

Whereupon it is ordered by the court that the clerk of this court make up and certify to the supreme court of the United States a full and complete transcript of the record and proceedings herein.

Said appeal bond is in words and figures following, to wit:
250 Know all men by these presents, that we, Robert L. Cutting, jr., and George R. Fearing are held and firmly bound unto the Missouri Pacific Railway company, Cornelius K. Garrison, and others, in the full and just sum of five hundred dollars, to be paid to the said Missouri Pacific Railway company, Cornelius K. Garrison, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately, at the March term of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the Pacific Railroad, plaintiff, and the

Missouri Pacific Railway company, Cornelius K. Garrison, and defendants, was rendered against the said Pacific Railroad, and the said Pacific Railroad having obtained an appeal of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a supreme court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Pacific Railroad shall prosecute said appeal to effect, and answer all costs if it fail to make good its appeal, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

[SEAL.] R. L. CUTTING, JR.
[SEAL.] GEORGE R. FEARING.

Approved by
SAMUEL TREAT.

STATE OF NEW YORK, }
City and County of New York. }

Personally Robert L. Cutting, jr., and George R. Fearing, known to me to be the signers and sealers of the foregoing instrument, and each made oath that each of them were worth more than one thousand dollars over and above all exemptions, and that they each of them have over one thousand dollars' worth of real estate in fee-simple in the city of New York; the said Cutting made oath that he resides at — West 21st street in the city of New York, and the said Fearing made oath that he resides at the city of Newport, state of Rhode Island

R. L. CUTTING, JR.,
GEORGE R. FEARING.

Sworn to before me on this 21st day of April, 1881.
[SEAL.] LUDWIG R. MILLER,
Notary Public, appointed from Kings Co.

251 Upon the hearing of said cause the following opinion was delivered by Honorable George W. McCrary, circuit judge, who presided:

252 Circuit court of the United States, eastern district of Missouri, March term, 1881.

The Pacific Railroad (of Missouri) }
vs. } In equity.
The Missouri Pacific Railway Co., C. K. Garrison, et al. }

Glover & Shepley, for complainant; Melville C. Day, J. O. Broadhead, Thomas J. Portis, for respondents.

On Demurrer to Bill.

McCrary, circuit judge.—This is either an original bill to impeach a decree of this court for fraud, or a bill of review upon newly discovered facts and evidence. We think it is the former, and as that is in accordance with the claim of complainant's counsel, we will so regard it, remarking, however, that if it be
253 the latter it is clearly bad, because filed too late, and also because filed without the leave of the court.

Ricker *v.* Powell, 100 U. S., 109.

Story's Eq. Pl., sects. 412–414.

Considered as an original bill, is it sufficient?

Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law, or decrees in chancery, on the ground of fraud. The rules by which the sufficiency of such bills are to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery.

United States *v.* Throckmorton, 98 U. S., 61.

Among these rules are the following:

1. No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and, in the exercise of due diligence, might have made them known to the court pending the original suit.

Foster et al. *v.* Wood, 6 John. Ch., 86.

Lansing *v.* Eddy, 1 Johns. Ch., 49.

Kibbe *v.* Benson, 17 Wall., 627.

2. Nor will relief be granted if the complainant might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit.

United States *v.* Throckmorton, supra.

Applying these rules to the present case, we are brought at once to the inquiry whether the present complainant, a corporate body, which was a defendant in the suit of Ketchum, had notice of the fraud now alleged, or might have learned the facts by proper diligence, and might have pleaded them in that suit. We find no allegation in the bill charging that the complainant was ignorant
254 of the facts pending the original suit, much less that it was unable, after due diligence, to ascertain and plead them. In this respect the bill is insufficient. There is a want of these material affirmative allegations. But the demurrer goes further, and raises the question whether the bill and exhibits do not show affirmatively that the present complainant, through its stockholders, had notice of the foreclosure suit; knowledge of the defense now insisted upon against the third mortgage bonds; and ample opportunity to make that defense.

It is, we think, very clear that in considering the question of notice no distinction can be made between the corporation and its officers, and stockholders. We cannot separate them, and say the

officers and stockholders knew of the fraud, but the corporation did not. If, therefore, the stockholders were advised of the foreclosure suit and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on therein, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches.

That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defence, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the directors to resign, that others might be appointed in their place who would properly attend to the duties of their office; also that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum.

It further appears that at a meeting of stockholders held March 27, 1876, at St. Louis, several months before the rendition of the decree of foreclosure, a resolution was adopted requesting the directors to employ counsel to aid in the defence of the foreclosure suit. This meeting was held while the suit was pending, and in the city where the court was sitting. (See record Ketchum case,
255 page 50.) It was not enough for the stockholders to content themselves with the passage of this resolution, especially as the bill avers that it was disregarded. They were bound to go forward, with due diligence, in the assertion of their rights, which they knew were imperilled; and we see enough in the record to satisfy us that they would have done so but for the fact that they, or their managing committee to whom they intrusted their interests, afterwards became satisfied with and assented to the decree.

It is very apparent that the stockholders were dissatisfied with the action of the directors and attorney of the company in the defense of the foreclosure suit. They were therefore put upon inquiry and bound to do whatever it was in their power to do to protect their interests. Any individual stockholder was at liberty to apply to the court for leave to intervene and defend. The stockholders were parties in interest, and upon representing that fact to the court, and showing that the officers were not defending in good faith, they would, without doubt, have been allowed to defend. That the court in that case recognized the propriety of this is clear from the fact that several stockholders asked and readily obtained leave to appear and defend.

It may be true, as a general proposition, that the stockholders of a corporation are not bound to intervene in a suit against the corporation for the protection of their rights. If the officers fraudulently consent to judgment or decree, the stockholders may, perhaps, afterwards file a bill to set it aside, provided they do so within a reasonable time after the discovery of the fraud. But we do not think it can be maintained that the stockholders of a cor-

poration, who have notice that the officers are not faithfully defending a suit, can neglect to intervene or to take any steps in the way of endeavoring to do so; permit final judgment or decree to be entered, and sale to take place, and then, after years have elapsed, be permitted to attack the validity of the proceedings.

256 If this were not a rule applicable generally to all corporations, it would still, we think, apply to this particular corporation, for the reason that its charter vests in the stockholders, in annual meeting assembled, power to do and perform all corporate acts authorized by the charter. (Laws of Mo., 1851, p. 268.

We have already seen that the stockholders were aware of the suit; that their attention was directed to it; that they distrusted the officers of the corporation and took steps looking to the assertion of their rights. It is also apparent from the record of the proceedings in the Ketchum case that they knew the facts now set up by way of defense. Akers, one of their number, and also the county of St. Louis, on behalf of themselves and such other stockholders as might join therein, appeared in said suit, and by leave of court answered and filed cross-bills, setting forth in substance the principal facts now relied upon. (Record Ketchum suit, p. 24)

It was, therefore, correctly stated by the judges of this court in their return to the alternative writ of mandamus in Ex parte Cutting that "said Cowdrey and all other stockholders who might join with him were in court during all proceedings of the term when the decree of foreclosure and sale was entered, and had the fullest opportunity to intervene by joining in the answers and cross-bills filed by Akers and said St. Louis county, and otherwise."

This, upon the ground that the stockholders were bound to take notice of the proceedings of the stockholders' meetings, and were also bound by the action of their committee appointed to represent them in this litigation, as well as upon the further ground that some of their number actually appeared and were admitted as parties to the suit. We are, therefore, constrained to hold that the stockholders were concluded by the decree and sale, and that whatever concludes the stockholders, individually and collectively, concludes the corporation as well. Another consideration has

257 great weight with us. The stockholders of the Pacific Railroad, having knowledge of all the facts, and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either during a period of four years. In the meantime the decree had been fully executed; the property had been sold and the sale had been confirmed; the purchaser at the sale had conveyed to a new corporation, which had issued new stock, and executed negotiable bonds for large sums secured by mortgage upon the property. The stock and bonds of the new company have gone into the market. Whether it is all held by innocent purchasers, we are, of course, in the absence of proof, unable to say, but the facts and circumstances to which we

have adverted certainly furnish strong reasons for holding that the stockholders and the corporation have been guilty of laches. The case of Wetmore *v.* The St. Paul, etc., Railroad company, 3 Fed. Rep. 177, was a bill by stockholders to set aside a sale and the decree of foreclosure upon facts somewhat similar to those presented by the present bill.

Mr. Justice Miller in that case said:

"The purpose of the petition is no less than to set aside the sale of a railroad which is perhaps worth $20,000,000 or more; a road which has been reorganized since the purchase, with a new set of directors, a new set of stockholders, very largely, and above all, a new set of bondholders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in the possession of the road over a year, and has issued, as I say, some $10,000,000 or $15,000,000 of new bonds, held all over the world; and now original bondholders in the old company, representing $1,500,000, come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road."

And again:

"The sale was had. A part of the original bondholders
258 were, under a special organization, according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into the court. He did report it, and the sale was confirmed.

"Now, that sale being confirmed, a deed made by the master, property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name, doubtless a great deal of the stock that they held passed into the hands of other men—certainly the bonds that they issued upon the strength of that new organization, to the extent of $8,000,000, having passed into the hands of other men—these parties now, for the first time, come into this court and ask that they be permitted to upset all the transactions, to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

"No authority is shown, no precedent is shown, and I do not believe any can be shown for such a proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done."

Numerous other questions, and some of them important, and perhaps doubtful questions, have been discussed at the bar, but the conclusion reached renders their decision unnecessary. Among them is the important question whether, regarding this as an orig-

inal proceeding, to set aside a decree of this court for fraud, the court has jurisdiction irrespective of the citizenship of the parties.

Another is the question whether such a bill, like a bill of
259 review on the ground of newly-discovered facts, must be filed within the period for taking an appeal. The affirmative of the latter proposition seems to have been held in Massachusetts and elsewhere.

Evans *vs.* Bacon, 99 Mass., 213.

The demurrer to the bill is sustained.

TREAT, district judge, concurs.

260 UNITED STATES OF AMERICA, } *ss.*
Eastern district of Missouri, }

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record in case No. 1677, of Pacific Railroad (of Missouri,) plaintiff, against Missouri Pacific Railway company et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 15th day of July, in the year of our Lord eighteen hundred and eighty-one.

M. M. PRICE, *Clerk of said court.*
By A. P. SELBY, *Deputy.*

(Endorsement on cover:) E. Missouri, C. C. U. S.; No. 346; The Pacific Railroad of Missouri, appellant, *vs.* The Missouri Pacific Railway company, Cornelius K. Garrison et al.; filed October 8, 1881; 260 pages.

111-505

UNITED STATES OF AMERICA, } *Sct.*
Eastern District of Missouri.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR SAID DISTRICT.

GEORGE E. KETCHUM,

vs.

PACIFIC RAILROAD ET AL,

AND

N. A. COWDRY,

vs.

PACIFIC RAILROAD ET AL.

BIXTON & SKINNER STA. CO., ST. LOUIS.

The following is a synopsis of the Record entries in case

N. A. COWDRY and others, *Complainants*,

No. 704. vs.

PACIFIC RAILROAD and others, *Defendants*.

In the Circuit Court of the United States, for the Eastern District of Missouri:

1875.

November 13th. Bill filed. Subpœna in Chancery issued returnable to the December Rules.

Nov. 15th. Affidavits of Bowman & Rechtein filed.

Nov. 22d. Notice of motion for an order to appoint examiners to take testimony orally.

Nov. 26th. Affidavit of Sutton filed.

Dec. 6th. Motion to dismiss as to Akers and Vogel filed. Appearance entered of the following parties:

DURKEE AND LACKLAND.
PACIFIC RAILROAD.
ATLANTIC AND PACIFIC RAILROAD.
ANDREW PEIRCE.
T. T. BUCKLEY.
JAMES BAKER.
SAMUEL HAYS.
M. J. LIPPMAN.
D. R. GARRISON.
JOHN TAUSSIG.
OLIVER HART.
D. K. FERGUSON.
T. B. EDGAR, and
WEBB M. SAMUEL.

Dec. 11th. Dismissed as to Akers and Vogel. Order for Injunction on plaintiff giving bond. Bond never given.

1876.

January 4th. Affidavits of Lippman, Hays and Baker filed; also affidavit of Dearborn filed January 5th.

Jan. 7th. Amended Bill filed.

February 5th. Answers filed by the following parties:

SAMUEL HAYS.
M. J. LIPPMAN.
WM. H. COFFIN.
JAMES BAKER.
D. R. GARRISON.
JOHN TAUSSIG.
OLIVER HART.
D. K. FERGUSON.
WEBB M. SAMUEL.
T. B. EDGAR.
ANDREW PEIRCE.
E. O. STANARD.
D. P. ROWLAND.

Feb. 7th. Second amended Bill filed. Pacific Railroad files answer. Order for service and service on non-resident defendants.

March 6th. C. K. Garrison enters appearance.

March 11th. Answer of Directors to second amended bill, viz.:

SAMUEL HAYS.
M. J. LIPPMAN.
D. R. GARRISON.
JOHN TAUSSIG.
OLIVER HART.
D. K. FERGUSON.
WEBB M. SAMUEL.
T. B. EDGAR.
E. O. STANARD.
D. P. ROWLAND and
JAMES BAKER.

March 11th. Demurrers of the following parties to second amended Bill, viz.:

FISH AND VAIL.
A. & P. R. R. Co.
ANDREW PEIRCE.
T. T. BUCKLEY and
PACIFIC RAILROAD.

March 20th. C. K. Garrison files demurrer. Answer of Pacific Railroad to second amended Bill filed.

April 3d. Leave to Fish and Vail till June. Rules to plead.

Sept. 13th. Answer of C. K. Garrison filed.

Oct. 6th. Separate replications of N. A. Cowdry to the answers of the Pacific Railroad, Atlantic & Pacific Railroad Company and the Directors of the Pacific Railroad filed.

Nov. 4th. Replication of Cowdry to the separate answer of C. K. Garrison filed.

1882.

September 22d. Complainants, by attorneys, and by leave of Court, dismiss cause without prejudice.

2ND AMENDED BILL, FILED FEBRUARY 7, 1876.

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF MISSOURI.

N. A. COWDRY, COMPLAINANT, vs. THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC RAILROAD COMPANY, AND OTHERS, DEFENDANTS.	In Equity. September Term, 1875.

Your petitioner, N. A. Cowdry, files this amended Bill of Complaint, by leave of the court, as and for an amendment to his original bill.

To the Honorable Judges of the Circuit Court of the United States, for the Eastern District of Missouri.

1st. Your orator, N. A. Cowdry, a citizen of the City and State of New York, brings this, his bill of complaint, against:

The Pacific Railroad, a corporation incorporated by the State of Missouri, having its office and principal place of business in the City of St. Louis, in said State of Missouri;

The Atlantic and Pacific Railroad Company, a corporation incorporated by Act of Congress of the United States, approved July 27, 1866;

Andrew Peirce, of the City of Boston, State of Massachusetts, William H. Coffin, whose residence is, to your petitioner, unknown; James Baker, Daniel R. Garrison, Oliver A. Hart, Samuel Hays, M. J. Lippmán, Webb M. Samuel, E. O. Stanard, John J. Taussig, T. B. Edgar, D. K. Ferguson, D. P. Rowland, each and all of whom are Directors in said Pacific Railroad;

Joseph Seligman, Andrew V. Stout, Clinton B. Fisk, Thomas T. Buckley, James D. Fish, Cornelius J. Bergen, Henry F. Verhune, James W. Elwell and George F. Stone, who, together with the above-named Andrew Peirce, William H. Coffin and Daniel R. Garrison, are Directors in the said Atlantic and Pacific Railroad Company;

Rufus J. Lackland and Dwight Durkee, trustees named in a deed of trust claimed to have been made by said Pacific Railroad, on or about the 1st day of May, 1872;

Jesse Seligman and James Baker, trustees named in a deed of trust claimed to have been made by said Pacific Railroad, on or about the 1st day of October, 1873;

Andrew V. Stout and T. B. Edgar, trustees named in a deed of trust claimed to have been made by said Pacific Railroad, on or about the 1st day of September, 1872;

Henry F. Vail and James D. Fish, trustees named in a deed of trust claimed to have been made by said Pacific Railroad, on or about the 15th day of December, 1874, to secure the payment of bonds commonly called $2,000,000 of Improvement Bonds;

Henry F. Vail and James D. Fish, trustees named in a deed of trust claimed to have been made by the said Pacific Railroad, on or about the 10th day of July, 1875, a copy of which is attached to this complaint, marked Exhibit A, and to which your orator asks leave to refer, as if it were set out in full in the body of the complaint;

And C. K. Garrison.

2d. And therefore your orator complains and says, that he is the owner of one thousand shares of one hundred dollars each, of the capital stock of the defendant, the Pacific Railroad; that he is the chairman of a committee of stockholders who, your petitioner avers, is authorized and does represent in and by this bill of complaint, about thirty-five thousand shares of said capital stock, amounting to over one-half of the entire capital stock issued by said Pacific Railroad.

That he brings this bill of complaint, not only for his own benefit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad, who may come in and contribute to the cost and expenses necessary for the prosecution of this suit.

3d. Your petitioner avers, upon information and belief, that the defendant, the Pacific Railroad, owns a line of railroad, built, equipped, and in daily operation, and all its franchises and appurtenances, extending from the City of St. Louis westward, to Kansas City, a distance of about 283 miles. That said premises are encumbered by the following mortgage liens or bonded debt:

1st. To U. A. Murdock and Luther C. Clark, survivors, trustees to secure the payment of the sum of.....$7,000,000

Commonly called the First Mortgage.

2d. To E. D. Morgan and Joseph Seligman, trustees, to secure the payment of $3,000,000, of which there is now outstanding the sum of. $2,804,000
Commonly called the Second Mortgage.

3d. To Rufus J. Lackland and Dwight Durkee, trustees..... 800,000
Commonly called the Real Estate Bonds.

4th. To Jesse Seligman and James Baker, trustees..... 500,000
Commonly called the Carondelet Branch Mortgage.

5th. To A. V. Stout and T. B. Edgar, trustees. 1,500,000
Commonly called the Income Bonds.

6th. To Henry F. Vail and James D. Fish, trustees..... 2,000,000
Commonly called Improvemement Bonds.

7th. To Henry F. Vail and James D. Fish, trustees, $4,000,000, less the income and improvement bonds, leaving the sum of..... 500,000
Commonly called Third Mortgage bonds.

8th. The County of St. Louis (unsecured bonds) 720,000

$15,824,000

4th. That the premises known as the Pacific Railroad are now earning, and for the last six years have earned annually, from $3,200,000 per annum to $3,700,000 per annum, which, after paying the taxes and operating expenses, have been amply sufficient to pay all interest upon all legitimate debts of the railroad company, and a fair dividend to the stockholders. That the net earnings of said Pacific Railroad Company, according to the printed reports made by the defendants, the Atlantic and Pacific Railroad Company, and by Andrew Peirce and the other defendants, directors

in said Atlantic and Pacific Railroad Company, are about thirty-eight per cent. of the gross earnings, or say from $1,216,000 to $1,406,000 per annum.

5th. That the defendants, except the defendants Henry F. Vail, C. K. Garrison, Rufus Lackland and Dwight Durkee, combined and conspired among themselves, and with others, to your petitioner unknown, to wrong, defraud and injure your petitioner and other stockholders of the Pacific Railroad, with the intent and purpose of injuring him in his just rights as a stockholder of said Pacific Railroad Company, as hereinafter set forth.

That on or about the 29th day of June, 1872, and before that time, the defendants, with the exceptions above named, confederated and combined, and with others, to your petitioner unknown, and acquired a majority interest in the capital stock of said Pacific Railroad, whereby they were enabled to do, and did make a pretended lease of the premises known as the Pacific Railroad, to the defendant, the Atlantic and Pacific Railroad Company, a copy of which pretended lease is annexed to this complaint, marked Exhibit "B," to which your petitioner begs leave to refer as fully as if it were set out at length in this complaint. That said pretended lease was wholly unauthorized, unlawful and void; that neither the Congress of the United States nor the State of Missouri, have either of them authorized, or given to either of said corporations, defendants, any authority whatever to lease said premises known as the Pacific Railroad; that without authority first had either from Congress or from the State of Missouri, said lease could not lawfully be made by either party thereto. That by the terms of said pretended lease, the management and control of said Pacific Railroad was attempted to be placed under the direction and entire control of the Atlantic and Pacific Railroad Company; that said last named company, under

said pretended lease, obtained possession of said Pacific Railroad, and of all its property, which possession they still hold; that for a time they paid the stipulation rent, viz.: from the time of taking possession, in 1872, to July, 1875; that since July, 1875, they have paid no rent, and they are now in default in the payment of rent due October 15th, 1875, $101,736, and January 15th, 1876, $101,736, making the aggregate default in rent, which is now past due, the sum of $203,472.

That by the terms of said lease, the defendant, the Atlantic and Pacific Railroad Company, had no authority or right to encumber the leased property, except for the purpose of paying the debts of said Pacific Railroad.

That the earnings and income of the Pacific Railroad, while in the possession of said Atlantic and Pacific Railroad Company, have been quite sufficient, and the petitioner avers, if properly administered, more than enough to pay the just and proper operating expenses, and all accruing interest on the bonded debt due from said Pacific Railroad Company.

That for the purpose of paying the floating debt of the Pacific Railroad Company, in anticipation of said lease, the said defendants made, executed and delivered a mortgage upon their entire property, excepting some lots in St. Louis, dated July 1, 1871, to Edwin D. Morgan and Joseph Seligman, in trust, to secure the payment of $3,000,000 of bonds, called the Second Mortgage Bonds, all of which bonds they issued, and sold the same in the market, and had the defendants applied the proceeds thereof to the proper purposes for which it was issued, the Pacific Railroad Company could not have owed any floating debt at the time said Atlantic and Pacific Railroad Company took possession of said Pacific Railroad Company under said pretended lease, viz., July 1st, 1872.

6th. Your petitioner avers, upon information and belief, that the proceeds of the $800,000 Real Estate Bonds, issued as above described, on the 19th of July, 1872, and the $500,000 Carondelet Branch Bonds, issued as above described, October 1st, 1873, were sufficient and ample with which to pay for all permanent improvements made by said Atlantic and Pacific Railroad Company upon the premises claimed to be leased by them from the Pacific Railroad.

7th. Your petitioner avers, upon information and belief, and charges the facts to be that the issue of said $1,500,000 Income Bonds, September 1st, 1872, and the issue of said $2,000,000 of Improvement Bonds, December 15th, 1874, by the defendants, were fraudulent and unauthorized, and not required by any legitimate and proper wants of the said Pacific Railroad Company, and the said issue of bonds were not for the use and benefit of said Pacific Railroad Company, that whatever benefit was derived from said issues of bonds, inured to the said Atlantic and Pacific Railroad Company and to the other defendants in this cause, except the Pacific Railroad Company, and except said Vail, Garrison, Lackland and Durkee.

The petitioner avers, upon information and belief, and charges the facts so to be, that said Income and said Improvement Bonds were wrongfully issued by, and at the request of, said Atlantic and Pacific Railroad Company and the defendants above named as directors in said Atlantic and Pacific Railroad Company, in collusion with others to your petitioner unknown, for the purpose, and with the intent of encumbering, conveying, and misappropriating the property of said Pacific Railroad Company, to the great injury of your petitioner and other stockholders of said company.

8th. Your petitioner avers, upon information and belief, and charges the facts so to be, that the issue of $4,000,000

of bonds known as Third Mortgage Bonds, purporting to be secured by said mortgage made to Henry F. Vail and James D. Fish, trustees, dated July 10th, 1875, was made by the defendants, some or all of them conspiring and combining with others to your petitioner unknown.

That the said mortgage, and the bonds issued thereunder, was made and issued at the request, and with the consent, and by the direction of said Atlantic and Pacific Railroad Company, and by the defendants above named, as directors in said Atlantic and Pacific Railroad Company, under and pursuant to a pretended authority derived from said pretended lease. That the wants of said Pacific Railroad did not require the issue of said Mortgage Bonds, or the making of said mortgage. That the proceeds of said Mortgage Bonds were used, and intended to be used, for the use and benefit of the said Atlantic and Pacific Railroad Company, or for the use and benefit of the defendants herein, other than the Pacific Railroad Company.

That said mortgage, and the bonds issued thereunder, and purporting to be secured thereby, is wholly unauthorized and void; that the only pretended authority for the issue of said bonds, and the making of said mortgage, is derived from a pretended vote of the stockholders of said Pacific Railroad Company, at a special meeting of stockholders held at St. Louis, July 10th, 1875 (the very day the mortgage was made); that the whole number of votes given at said meeting was 44,022 shares, of which 43,754 shares were given by Oliver Garrison, as proxy of that number of stockholders.

That said proxies on 43,754 shares were given in pursuance and at the request of Samuel Hays, president, one of the defendants herein, but who was really acting for and actually in the pay of said Atlantic and Pacific Railroad Company, as auditor of said last-named company.

That said Hays issued a circular, a copy of which is attached hereto, marked "Exhibit C." That said proxies were procured in pursuance of said circular, and upon the truth of the representations therein contained, and upon the verbal representations of others of the defendants used in soliciting stockholders to sign said proxies.

That the representations contained in said circular are false and fraudulent, in this, that it implies that floating liabilities had been created on account of the Pacific Railroad by the Atlantic and Pacific Railroad Company, in permanently improving the Pacific Railroad in a manner and form and to an extent not required to be done at the proper charge and expense of the Atlantic and Pacific Railroad Company, by said pretended lease, under which the Atlantic and Pacific Railroad Company were in possession of the premises known as the Pacific Railroad. Your petitioner avers, upon information and belief, and so charges the fact to be, that no such liabilities rightfully existed as against the Pacific Railroad.

That the defendants confederated and combined together, or some of them, and together with persons to your petitioner unknown, for the purpose of encumbering, conveying or misappropriating the property of the Pacific Railroad, and with the intention of selling out the same at a sum far less than its real value, and with the intention on their part of buying in said premises known as the Pacific Railroad, and acquiring a title thereto, at such reduced sum far less than the real value of the premises, and by so doing, wrongfully enrich themselves at the loss and cost of your petitioner and other stockholders, not in the purchasing ring with them, and to defraud said stockholders of their just rights in the property.

That in pursuance of said fraudulent design, said defendants executed and delivered said mortgage on the very day

they obtained said fraudulent authority from the stockholders to make the same, viz.: July 10, 1875, showing complete preparation beforehand for the expected event. That the mortgage they executed on the 10th of July, 1875, was to secure the payment of bonds bearing interest from May 1, 1875, and falling due November 1, 1875. That said mortgage wholly omitted the usual days of grace of one to six months after the maturity of semi-annual interest, before judicial foreclosure could be commenced.

That in pursuance of said design to defraud and wrong your petitioner and other stockholders of the Pacific Railroad, the defendants, or some of them, not being able to induce the said Henry F. Vail and the said James D. Fish, to whom said mortgage of July 10, 1875, was made in trust, to secure the $4,000,000 of bonds named therein, procured one George E. Ketchum to make oath to a printed bill of complaint, on the 3d day of November, 1875, just two days after the interest had become due, for the purpose of foreclosing said third or $4,000,000 mortgage; that said Ketchum bill of complaint against said Pacific Railroad Company and others, is filed in this court, and your petitioner begs leave to refer to the same, if need requires, in the prosecution of this suit. That so flimsy and uncertain is the complaint in that case, that the complainant is not able to allege or swear to any definite interest in the bonds upon which he brings his suit to foreclose, but loosely states, on folio 37 of the printed complaint, "that he is the holder of many of said third mortgage bonds," which is all the allegation he makes of any interest in the matter.

9th. That the holders of said bonds, issued under and purporting to be secured by said mortgage, to said Vail and Fish, trustees, dated July 10th, 1875, took them with full knowledge of all the matter and things alleged in this petition

and have bought and received them as a tainted, doubtful and illegal security, at a low price, in some instances merely nominal. The petitioner avers this to be specially true of C. K. Garrison, one of the defendants herein named, who, after attending a meeting of the stockholders of the Pacific Railroad Company, held in the city of New York, on the 28th and 29th of December, 1875, at which meetings the frauds of some of the other defendants herein, and the want of equity attaining said Third Mortgage Bonds, were discussed and expressed, went from said meeting and thereafter purchased, from various creditors of the Atlantic and Pacific Railroad Company, said Third Mortgage Bonds to a very large nominal amount, the petitioner avers upon information and belief, to the par amount of $1,500,000, at the nominal rate of fifty per cent. or thereabouts.

10th. Your petitioner avers, upon information and belief, and charges the facts to be, that said Third Mortgage, so called, the mortgage claimed to have been made by the Pacific Railroad, July 10th, 1875, to Henry F. Vail and James D. Fish, trustees, was made at the instance and request of said Atlantic and Pacific Railroad Company, and some of the other defendants herein, under the pretended authority of said pretended lease; that said mortgage is unauthorized and fraudulent, and the bonds issued thereunder are unauthorized and illegal, and without consideration so far as the makers thereof are concerned.

11th. Your petitioner avers, upon information and belief, and therefore charges, that the defendants, Andrew Peirce, James H. Baker, Samuel Hays and Wm. H. Coffin, directors in said Pacific Railroad, combined and conspired with themselves, and with persons to your petitioner unknown, and with intent to defraud and wrong your petitioner in that respect, caused proceedings of foreclosure to be commenced upon said Third Mortgage, made July 10th, 1875 to

Henry F. Vail and James D. Fish, trustees, by said George E. Ketchum, with the intent of having the premises sold upon said proceedings, with the hope and expectation, on their part, of buying in the same to their own use and that of their associates, at much less than the fair and just value of said mortgaged premises. That said suit of foreclosure was commenced by them in the name of said George E. Ketchum, two days after the first installment of interest had, by its terms, become due, and less than four months after said mortgage had been made. That said defendant, James H. Baker, controlled said suit, and gave directions as to its prosecution. That the stockholders of said Pacific Railroad held a meeting in the city of New York on the 5th day of November, three days after said suit had been commenced, which meeting was addressed by said defendants, Andrew Peirce and Clinton B. Fisk, and at which said defendant, Wm. H. Coffin, was present. That at said meeting the fact that said suit had been commenced, or was contemplated, was carefully withheld and concealed from said stockholders by said Peirce and Fisk, and in no part of the remarks made by either of them to said meeting, was any allusion made to the commencement, or threatened commencement, of said foreclusure suit.

That said defendants, Baker, Peirce, Coffin and Fisk caused notice in said Ketchum suit to be given of an application for the appointment of a receiver, at Omaha, Nebraska, for the 8th of November, 1875, to Mr. Justice Dillon, although at that time said Circuit Court of the United States was in session at St. Louis where, if said suit and the application for a receiver therein had been in good faith, the bill of complaint would have been filed and the motion or application would have been made. That said application at Omaha, for a receiver, was withdrawn by said defendant Baker, or by orders from him, and subsequently filed in this court; that in all these matters, the

said Baker, Peirce and Coffin have acted in the interest of said third mortgage bondholders, and not in the interest or for the benefit of the stockholders of the Pacific Railroad, whose trustees and directors they each of them were; all of which was in pursuance of said fraudulent intent to aid in disposing of said mortgaged premises; to wrong and defraud your petitioner and the other stockholders out of the premises embraced in said mortgage; that after giving notice of said application for a receiver, at Omaha, and after withdrawing the same, said defendants Baker, Peirce and Coffin, with other directors of said Pacific Railroad, caused said bill of complaint, brought in the name of said Ketchum against said Pacific Railroad, to be filed in this court, where they are now prosecuting the same, contrary to their duties as fiduciary agents, directors and trustees of the stockholders of said Pacific Railroad Company.

That said Baker has openly and in a public meeting declared that they have not made any defence to said bill of foreclosure, and that they do not intend to make any; that this declaration of said Baker was made in the presence of the defendants, Peirce, Coffin, Hays and Garrison, who each remained silent, thus ratifying and confirming said declaration of said Baker.

12th. Your petitioner avers, upon information and belief, and charges the fact to be so, that at a meeting of the directors of the Atlantic and Pacific Railroad Company, held on or about the 8th day of November, 1875, at the City of St. Louis, they authorized the president to surrender and cancel said lease.

That the president of said Atlantic and Pacific Railroad Company, Andrew Peirce, one of the defendants herein, in pursuance of said authority afterwards, and on the same

day, executed and delivered a pretended surrender and cancellation of said lease to said Pacific Railroad Company.

That said Atlantic and Pacific Railroad Company is in default in the payment of the rent covenanted in said pretended lease to be paid, the sum of $203,472, up to January 1, 1876, and the accruing rent thereafter, and all interest upon rents accrued and to accrue.

That said Atlantic and Pacific Railroad Company are bankrupt and insolvent, and are wholly unable to pay any unsecured claims against them. That their mortgage creditors are pressing their mortgage claims to foreclosure, and seeking for a sale of all of the premises known as the Atlantic and Pacific Railroad, as will more fully appear by reference to the suit of Littlefield vs. The Atlantic and Pacific Railroad Company and others, now pending in this court, and to the complaint and pleadings in which suit your petitioner begs leave to refer, as need may occur in the progress of this suit.

That said Atlantic and Pacific Railroad Company has no ability or expectation of paying said rent agreed to be paid under said pretended lease, or to keep and comply with its other obligations imposed by, through and under said pretended lease.

That because of the condition of said Atlantic and Pacific Railroad Company, above set forth, it is wholly unable to take proper care of the premises known as the Pacific Railroad, embraced in said pretended lease.

13th. Your petitioner further shows, upon information and belief, and charges the fact to be so, that the present directors of the Pacific Railroad, defendants in this suit, have little, and some of them no interest in the capital

stock of said railroad company. That their interest, as shown by the company's books, is as follows, viz.:

	Shares.		Shares.
James Baker.....	280	Webb M. Samuel..	none.
John J. Taussig.....	210	T. B. Edgar.....	none.
M. J. Lippman.....	100	D. K. Ferguson...	none.
D. R. Garrison.....	22		
Andrew Peirce, Jr...	14		
Samuel Hays.....	10		
Oliver A. Hart.....	10		
E. O. Stanard	10		
D. P. Rowland.....	10		
Total.....	666		

more than 400 shares of which has been transferred to them since the commencement of this suit.

14th. Your petitioner avers, upon information and belief, and therefore charged the fact to be, that said defendants, Andrew Peirce, William H. Coffin and Daniel R. Garrison, are directors in both companies, viz.: The Pacific Railroad and the Atlantic and Pacific Railroad Company; that their interest in the Pacific Railroad is merely nominal, but that their interest in the Atlantic and Pacific Railroad Company is very large, amounting to nearly all they are worth.

That the defendants, James Baker and Samuel Hays, are the employes of the Atlantic and Pacific Railroad Company, the former as attorney and counsellor, the latter as auditor or clerk of said Company, that their compensation and salaries are derived from said Atlantic and Pacific Railroad Company; that their pecuniary interest, which the petitioner beiieves to be their controling interest with these matters, is with said Atlantic and Pacific Railroad Company.

That the defendant, M. J. Lippmam's, chief interest in

this matter, is in selling the Atlantic and Pacific Railroad Company supplies of iron and other things required in operating a railroad.

That the interest of the other defendants, directors in said Pacific Railroad, is to your petitioner unknown, but your petitioner believes from their actions in this matter that their interest is hostile to your petitioner, and to the interest of the stockholders of the Pacific Railroad.

15th. Your petitioner avers, upon information and belief, and therefore charges the fact to be, that the defendants, directors in the Pacific Railroad, have combined and conspired, together with parties, some of whom are defendants herein, and others are to your petitioner unknown, to depreciate and destroy the property of the Pacific Railroad Company, to aid in the foreclosure of said Third, $4,000,000, Mortgage, made July 10th, 1875, and to aid the holders of said bonds, issued thereunder, in creating a large fraudulent debt upon said bonds, equal to the face value thereof, and to aid them in selling said mortgaged premises at a great sacrifice, with a view of buying in the same themselves, or of being interested with some party or parties to your petitioner unknown, in the purchase of said mortgaged premises, at a sum much less than its real value, to the great detriment and loss of your petitioner and other stockholders of said Pacific Railroad Company.

16th. Your petitioner avers, upon information and belief, and therefore charges that the defendants, or some of them, together with persons to your petitioner unknown, conspired together and combined to misappropriate the earnings and income of the Pacific Railroad, and to misappropriate the sums of money belonging to said railroad company, derived from the sales of the bonds above recited, as having been issued by them in the name of the said Pacific Railroad.

That said misappropriation of moneys consisted in part in applying said money to improper uses and purposes, and a neglect to apply said moneys to proper and essential uses and purposes, and omitting and neglecting to pay the accrued taxes imposed upon the property of the Pacific Railroad by the proper authorities of the State, and allowing said taxes and penalties for their non-payment, to accumulate against said premises, as claims against said company and liens upon its property; they have also neglected and omitted to pay the interest on the debt of the Pacific Railroad due to the County of St. Louis, amounting to a large sum of money, the petitioner believes to the sum of $49,000 per annum.

17th. Your petitioner avers, upon information and belief, and therefore charges the facts to be, that the defendants herein named as directors of the Pacific Railroad, were elected and held their office as directors at the solicitation of, and in the interest of, the Atlantic and Pacific Railroad Company; that three of them, viz.; Andrew Peirce, Wm. H. Coffin and D. R. Garrison, are directors in said Atlantic and Pacific Railroad Company—one of them, viz., James Baker, is the hired attorney of said Atlantic and Pacific Railroad Company, and one of them, viz., Samuel Hays, the President of the Pacific Railroad Company, is the employe of said Atlantic and Pacific Railroad Company, to-wit, its auditor or clerk, so that a legal quorum of the directors of the Pacific Railroad Company are the directors and employes of the Atlantic and Pacific Railroad Company; that they are seeking and endeavoring to injure your petitioner and other stockholders of the Pacific Railroad, by making onerous and improper bargains with said Atlantic and Pacific Railroad Company, on behalf of said Pacific Railroad, for the use of depot grounds at St. Louis, and for the use of the railroad of said Pacific Railroad Company from, and in, the city of St. Louis to Franklin, a station on the same line of railroad, about thirty-seven miles from St. Louis.

18th. Your petitioner avers, upon information and belief, and therefore charges, that the said defendant, the Atlantic and Pacific Railroad Company, claims that there is, or that there was since this suit was commenced, a large sum of money due to them from the Pacific Railroad, viz.: the sum of about $1,400,000, whereas the petitioner avers that upon a just and proper account stated between the two railroad companies, there is nothing due to said Atlantic and Pacific Railroad Company from said Pacific Railroad Company, which pretended indebtedness said defendants are seeking to get paid to said Atlantic and Pacific Railroad Company, contrary to law and right; your petitioner avers that on the contrary, upon a proper statement of the accounts between said railroad companies, the said Atlantic and Pacific Railroad Company is indebted to the said Pacific Railroad in a large sum of money, viz.: the sum of $3,000,000 and upwards.

19th. Your petitioner avers, upon information and belief, and therefore charges the fact to be, that said Atlantic and Pacific Railroad Company has wrongfully caused a large amount and quantity of the equipment--passenger cars, freight cars and locomotives, tools and materials purchased by or with moneys of and belonging to said Pacific Railroad Company, but temporarily in the possession of said Atlantic and Pacific Railroad Company—to be marked with the name of and as the property of said Atlantic and Pacific Railroad Company.

20th. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereinafter prayed for, your petitioner humbly prays the court to require the defendants, upon their several and respective corporal oaths, and according to their best information, belief, remembrance or knowledge, full, direct and

perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as they are hereinafter respectively required to answer; that is to say:

The Atlantic and Pacific Railroad Company are required to answer—by the oath of its proper executive and accounting officers—and each one of the defendants herein named as directors of said Atlantic and Pacific Railroad Company, are required to separately answer upon their oaths as above named:

1st. What amount of money have you received from the earnings of the Pacific Railroad from the time you took possession of the same, say July 1, 1872, to the time you were ousted of possession by the appointment of receivers, in the case of Littlefield vs. the Atlantic and Pacific Railroad Company and others, viz.: November ——, 1875?

2d. What sums of money derived from the sale of bonds, and what amount of bonds have you received during the same time, purporting to have been issued by the Pacific Railroad, of the mortgages and bonds hereinafter described?

State specifically the money and bonds received under each mortgage separately, viz.:

The second mortgage to E. D. Morgan and Joseph Seligman, trustees, dated July ——, 1871, for.....	$3,000,000
The real estate mortgage to Rufus J. Lackland and Dwight Durkee, trustees, dated July 19, 1872, for.....	800,000
The income bonds, A. V. Stout and T. B. Edgar, trustees, dated Sept. 1, 1872, for....	1,500,000

The Carondelet Branch mortgage to Jesse Seligman and James Baker, trustees, dated Oct. 1, 1873, for.....	$ 500,000
The improvement bonds, Henry F. Vail and James D. Fish, trustees, dated Dec. 15, 1874, for...	2,000,000
The third mortgage bonds to Henry F. Vail and James D. Fish, trustees, dated July 16, 1875, for.....	4,000,000

3d. What amount of money have you expended for taxes upon the premises known as the Pacific Railroad within the time named in the first interrogatory, and what sum is now due for taxes upon said premises, and what amount of taxes have been assessed upon said premises within the time above named?

4th. What amount of money have you expended in the operation of the Pacific Railroad, known as operating expenses, and what amount as and for ordinary renewals and repairs necessary to keep the property in good reasonable repair, and what amount have you expended for extraordinary renewals and repairs and betterments not properly chargeable to operating expenses, and what new equipment have you purchased for said Pacific Railroad Company during the same time, and how have you marked the same or caused it to be marked?

5th. What have you done with the bonds or money so received, if any you have so received; state fully and particularly if you have parted with the bonds received; state to whom, and for what consideration; give the particulars in detail?

6th. Have you, in pursuance of the supposed authority contained in said pretended lease, ever, and at what times

and how often requested, solicited or demanded the directors of the Pacific Railroad should make, execute and deliver, either and which of the above named mortgages, and that the bonds issued thereunder, and purporting to be secured thereby, should be delivered to you or to any of your officers, and which, and how many, of said bonds, and to which of your officers, and for what purpose was said bonds, or any of them, delivered to you or to any of your officers?

The defendants, Andrew Peirce, William H. Coffin, James Baker, Daniel R. Garrison, Oliver A. Hart, Samuel Hays, M. J. Lippman, Webb M. Samuel, E. O. Stanard, John J. Taussig, T. B. Edgar, D. K. Ferguson and D. P. Rowland, directors of said Pacific Railroad are required, upon their several oaths, and according to their best knowledge, remembrance or belief, to answer the following interrogatories:

1st. Do you sympathize with the efforts of the parties represented by, or in interest with, the said George E. Ketchum's Bill of Foreclosure, and have you counselled with said Ketchum or with any of his attorneys, solicitors or counsel upon the subject matter of said suit; state fully any and all things which you, or either of you, have done to bring about the commencement of said suit, and to facilitate or aid its prosecution?

2d. Are you, or either of you, the owners of any of said Third Mortgage Bonds, purporting to be secured by said mortgage to said Henry F. Vail and James D. Fish, trustees, made July 10th, 1875, or do the wives or children of either of you, or any firm or co-partnership in which you are interested, own any of said bonds, or have you, or either of you, any interest, express or implied, in any of said bonds? Or do you, or either

of you, your wives or your children, or any firm or co-partnership in which you are, or either of you, interested, own any of said bonds, designated as Income Bonds and Improvement Bonds, as hereinbefore described? If you say you, or either of you, or either of the other persons of whom you are interrogated, own or are interested in any of said Third Mortgage Bonds, said Income Bonds, or said Improvement Bonds, state fully, and in detail, how many and which of said bonds, what your or their interest is in the same, and what sum of money they cost you, and whether you have paid for the same?

And did you, or either of you, agree to subscribe and to pay for said bonds or any of them? If you say you did, have you paid for the same at the subscription price? What disposition have you, or either of you, made of said bonds?

3d. What, if any, is your interest in the stock of the Pacific Railroad, how many shares do you, or each of you, own or have any interest in, and in whose name does the same stand upon the books of the company?

4th. Have you, or either of you, ever purchased, or agreed to purchase, from the Pacific Railroad Company, or from the Atlantic and Pacific Railroad Company, or from any agent or banker of either of said companies, any of said above described, viz.:

The Second Mortgage Bonds.

The Carondelet Branch Mortgage Bonds.

The Real Estate Mortgage Bonds.

The Income Mortgage Bonds.

The Improvement Mortgage Bonds.

If so, state from whom, and which bonds you purchased or agreed to purchase, and what price you paid for the same, and when you purchased or agreed to purchase them?

The defendants, Rufus J. Lackland and Dwight Durkee, trustees, are required to answer, upon their oath and according to their best information and belief, the following interrogatories:

1st. What was the declared purpose of issuing said Real Estate Bonds? If you say $500,000 of them were issued for the purpose of paying a like amount about to become due, then say for what purpose the other $300,000 were issued? To whom were they sold, and to whom was the money paid, the proceeds of said sale?

2d. Was or was not one of the declared purposes of said increased issue of $300,000 to build the Carondelet Branch of the Pacific Railroad? Was said bonds or the proceeds of sale thereof applied to that purpose? If not, what purpose was the proceeds of sale of said $300,000 of bonds applied to?

Andrew V. Stout and T. B. Edgar, defendants, trustees, are required to answer upon their separate oath, and according to their best information and belief, the following interrogatories:

1st. What was the declared purpose of issuing said Income Bonds, and to what uses and purposes were the proceeds of said Income Bonds applied? What use was made of them? To whom were they sold, or with whom were they hypothecated, and at what price?

Henry F. Vail and James D. Fish, trustees, are required to answer upon their separate oaths, and according to their best information and belief, the following interrogatories:

1st. What was the declared purposes of issuing said $2,000,000 Improvement Bonds and the said $4,000,000 Third Mortgage Bonds? And to what uses and purposes were the proceeds of said bonds, or any of them, applied? What use was made of said bonds, or any of them? If they, or any of them, were sold, to whom were they pledged, and at what price, and for what purpose? What was done with the money raised by the sale or hypothecation of said bonds, or either of them?

Andrew Peirce, Joseph Seligman and Jesse Seligman, defendants, are required to answer upon their separate oaths and according to their best information and belief, the following additional interrogatories:

1st. What office or position of trust do you, or have you or either of you held, in said Pacific Railroad since February 1, 1871?

2d. Have you, or either of you, been interested in any contract or agreement with the Pacific Railroad Company, or with the Atlantic and Pacific Railroad Company, for the purchase or sale of any of the bonds described in this complaint, or in any of the bonds commonly called Second Mortgage Bonds, purporting to be secured by a mortgage to E. D. Morgan and Joseph Seligman, if so, when, and to what amount of such mortgage and which class of bonds, and to what extent?

3d. What price did you, or either of you, agree to pay for said bonds, and what price did you actually pay for said bonds? Give the details for each separate kind of bonds?

Have you taken and paid for all the bonds which you have signed papers or otherwise agreed to take and pay for,

and did you pay the full subscription price, or the price you agreed to pay?

4th. Did you and your associates, for your own account, or for the account of any other person or persons or corporation, or any one else—and if on account of yourselves and others, state in detail who they were—purchase a large or a controlling interest in the capital stock of the Pacific Railroad, with a view or expectation of consolidating the same with, or leasing the Pacific Railroad to the Atlantic and Pacific Railroad Company, what amount of said capital stock did you purchase or agree to purchase?

Did you purchase it, or any part of it, on your own account, or did you purchase it, or agree to purchase it, or any part of it, for the account or benefit of, or at the risk of the Pacific Railroad Company, directly or indirectly?

In what manner and form did you purchase it, and on whose account, and who shared the profits or loss of the purchase with you?

What commissions did you, or either of you, or any firm in which you are interested, receive for purchasing, selling and carrying said stock, or for either?

Your petitioner avers that he is without remedy at law.

21st. Wherefore your petitioner humbly prays this honorable court:

1st. To issue its proper process to make all the persons herein named as defendants, parties hereto.

2d. To allow the petitioner, whenever he is able to learn who the persons are who confederated and combined with the defendants herein named, as above set forth, to make

the said parties defendants hereto, and to require them, when so found, to make answer to his bill of complaint.

3d. To allow the petitioner, whenever he is able to learn the names of the holders of said $1,500,000 Income Bonds, said $2,000,000 of Improvement Bonds, and said $4,000,000 of Third Mortgage Bonds, to make them or any of them parties defendants to this suit, and to require them, when so found and made parties hereto, to make answer to his bill of complaint.

4th. That you will order an account to be stated between the defendants, the Pacific Railroad and the Atlantic and Pacific Railroad Company, and ascertain what indebtedness, if any, exist from one company to the other; and if, upon the statement of said account, the said Atlantic and Pacific Railroad Company shall be found indebted to the Pacific Railroad Company, that you will order said indebtedness to be paid, and declare the same to be a lien upon the property of said Atlantic and Pacific Railroad, prior to any mortgage or judgment made by or against said company since July 1, 1872, the time when the Atlantic and Pacific Railroad Company took possession of the property of the Pacific Railroad Company.

5th. That you will order an account to be stated by and between the defendants, or either of them, Andrew Peirce, Joseph Seligman, Jesse Seligman, or any firm or co-partnership of which they or either of them are members, and the Pacific Railroad, and if any indebtedness is found to exist from them or either of them, or from any firm or co-partnership of which they or either of them are members, that you will order the same to be paid to said Pacific Railroad Company.

6th. Upon finding the facts to be true, as alleged, concerning the Income Bonds, the Improvement Bonds, and

the Third Mortgage Bonds, so called, that you will order the bonds, under suitable penalties, to be brought into court and declared void and cancelled; that you will order said trustees, viz.: Jesse Seligman and James Baker, to bring into court and cancel the instrument or deed of trust under which they act, viz., the deed described in said bill of complaint, as being claimed to have been made by the Pacific Railroad Company, dated October 1st, 1873;

And, also, that you will order said trustees, Henry F. Vail and James D. Fish, to bring into court, that the same may be declared void, and to cancel the instruments or deeds of trust under which they act, viz., the deed described in said bill of complaint, as being claimed to have been made by the said Pacific Railroad, dated December 15th, 1874, to secure the payment of $2,000,000 of so called Improvement Bonds. Also, the one dated July 10th, 1875, to secure the payment of $4,000,000 of so called Third Mortgage Bonds, and all bonds owned or controlled by them, purporting to be secured by said deeds or instruments of trust, or either of them, that the same may be declared void and cancelled, and for nothing had.

7th. That upon finding the facts to be true, as alleged, you will order and decree said pretended lease from said Pacific Railroad Company to said Atlantic and Pacific Railroad Company, to be brought into court, and if found to be a valid lease, that you will cancel the same for non-fulfillment of the covenants therein contained, and restore the leased premises to said Pacific Railroad, and order the payment of such damages for said breaches of covenant as to equity appertains.

If said lease is found to be an unauthorized and void document, and that said Atlantic and Pacific Railroad Company have been in possession of said premises, known as the

Pacific Railroad, wrongfully, that you will restore the possession of said leased premises to said Pacific Railroad, and order and decree the Atlantic and Pacific Railroad Company to pay such damages for said wrongful occupation of said premises, as to equity appertains.

8th That upon finding said allegations to be true, respecting the defendants herein named as directors of the Pacific Railroad, and that they have, either by their acts of omission or commission, injured your petitioner and other stockholders of said railroad company, that you will remove each and every one of them from the office of director, and either appoint other directors in their places, or direct a meeting of the stockholders to be held, at which the stockholders shall be authorized to elect other directors to supply the places of those removed by the court.

9th. That the court will appoint its receiver for said Pacific Railroad, to take possession of the entire property of the defendant, the Pacific Railroad, to care for, and operate and manage said railroad, with all the usual powers of a receiver appointed by Courts of Equity, under the directions of this court.

10th. That the court will discharge the receivers heretofore appointed in the case of Littlefield vs. The Atlantic and Pacific Railroad Company, hereinbefore referred to, from the further custody, control or management of said Pacific Railroad or of any of its property, franchises or appurtenances, and that you will require said receivers to render an account of their management and doings, so far as the Pacific Railroad Company are concerned.

11th. Or that the court will grant to your orator such other, further or different relief as to equity and good conscience appertains.

And your petitioner, as in duty bound, will ever pray.

GLOVER & SHEPLEY,
Solicitors of Complainant.

HILL & BOWMAN,
Of Counsel.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. } *ss.*

N. A. Cowdry, being duly sworn, doth depose and say, that he is the complainant in the above-entitled cause: that he has read the complaint, and knows the contents thereof, and that the same is true, except so far as the matters contained therein are stated upon information and belief, and as to these matters he believes them to be true, and except that since this complaint was printed he has sold one hundred shares of said stock, and that he now holds 900 shares instead of one thousand, as therein stated.

N. A. COWDRY.

Sworn and subscribed before me by the said N. A. Cowdry, on the 2d day of February, 1876.

R. E. STILLWELL,
U. S. Commissioner.

{ SEAL. }

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MISSOURI.

George E. Ketchum vs. Pacific Railroad. } Answer and Cross Bill. In Equity. Filed February 7, 1876.

To the honorable the judges of the Circuit Court of the United States, for the Eastern District of Missouri, in the Eighth Circuit, sitting in equity:

Now comes Thomas P. Akers, a citizen of the State of Missouri, by leave of the court first had and obtained, and presents this, his answer and cross bill, in the above entitled cause: And humbly complaining showeth unto your honors that he is a stockholder in the Pacific Railroad (of Missouri); the owner of one hundred shares, of one hundred dollars each, in said corporation. And at all times saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint, contained, for answer thereunto, as he is advised are material or necessary for him to make answer unto, answering, saith: That he admits the allegation of complainant's said bill as to the first mortgage of $7,000,000, secured by deed of trust dated July 15, 1868, as also the allegations of complainant's said bill to the second mortgage of $3,000,000, secured by deed of trust dated July 1, 1871.

This respondent further says that as to the real estate mortgage of $800,000, secured as is alleged in said bill of complaint by deed of trust, dated April 19, 1872, he has no knowledge or information sufficient to enable him to form a belief, and is not sufficiently advised to either deny or admit, but asks that the court will require from complainant strict proof of the allegations in complainant's bill concerning the same.

And as to the said mortgage of $500,000 upon the Carondelet Branch, so-called, secured as is alleged by complainant, by mortgage or deed of trust, dated October 1, 1873, he has no knowledge or information sufficient to enable him to form a belief. And is not sufficiently advised to either deny or admit, but asks that the court will require from

complainant strict proof of the allagations of complainant's bill concerning the same.

That as to the said alleged mortgage to Henry F. Vail and James D. Fish, dated July 10, 1875, by which it was attempted to convey all the property, real and personal, rights, interests and franchises of the said Pacific Railroad, described in each of the four mortgages before mentioned, for the securing of $4,000,000 so-called Third Mortgage Bonds, respondent says that he, as a stockholder, never consented thereto; and is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that said alleged mortgage was fraudulently executed, and a pretended consent of a portion of the stockholders to the execution of the same was obtained through false and fraudulent pretences and representations in this, to wit: That it was, as he is informed and believes, falsely stated and represented to the directors and stockholders of the Pacific Railroad, by the directors of the Atlantic and Pacific Railroad Company, then in charge, as lessee of the Pacific Railroad; that a large amount of permanent improvements had been made on said Pacific Railroad, large and permanent improvements as to road-beds and bridges, by said lessee, and by reason of which the Pacific Railroad had become largely indebted therefor. And that such false representations were so made by verbal statements of the directors and officers of said Atlantic and Pacific Railroad Company, and also by means of printed circulars caused to be issued by said directors and officers and circulated among said stockholders; that said representations so made were, as he is informed and believes, false and fraudulent, and were made for the purpose of securing the assent of the directors and stockholders of the Pacific Railroad to said mortgage; that said mortgage was made and so fraudulently executed in fraud of the rights of the bona fide unsecured creditors, and all stockholders of said Pacific Railroad; that

the directors of said Atlantic and Pacific Railroad, for the purpose of obtaining by foreclosure of said mortgage a title to said road, caused, as he is informed and believes, said false and fraudulent representations to be so made; that the complainant in said bill, as respondent is informed and believes and has reason to believe, and upon information and belief alleges the fact to be, rescind all bonds now held by him, with full information of the fraudulent issue of the same, and of the facts as hereinbefore stated, and that said $4,000,000 bonds have been distributed and are now held by said complainant Ketchum and the directors of the said Atlantic and Pacific Railroad Company for said company and for themselves, and by their associates, with full knowledge of the facts above stated, and hereinafter recited, that prior to the time when said Third Mortgage was so executed, to wit: On the 29th of June, 1872, the said Pacific Railroad executed a pretended lease to the said Atlantic and Pacific Railroad Company, upon certain terms and conditions in said lease mentioned, the entire line of railroad then operated by it, as will more fully appear by copy of said pretended lease filed herewith; that under said pretended lease the said Atlantic and Pacific Railroad on said 29th day of June, 1872, obtained possession of said Pacific Railroad and its appurtenances, and continued in possession of same until about November 4, 1875; that under the terms of said lease, if the same were of binding force and effect, the Atlantic and Pacific Railroad Company agreed and covenanted to pay all debts contracted for the keeping said Pacific Railroad in good and sufficient repair as a first-class railroad; that all of said indebtedness of said Pacific Railroad, as then existed on July 10, 1875, in excess of the indebtedness existing June 29, 1872, was in fact the indebtedness of said Atlantic and Pacific Railroad Company, not only by reason of said lease, if valid, but by reason of the same having been contracted by said last-mentioned

company, while in possession of said road under said pretended lease, receiving its income, which was more than sufficient to pay all running expenses of the same, all interest on its mortgage debt, all taxes, and all indebtedness for improvements therein constructed for by said Atlantic and Pacific Railroad Company; that by reason of the foregoing facts, the said mortgage or deed of trust of July 10, 1875, was null and void and of no force and effect, and so known to be by said orator and all parties receiving and now holding said Third Mortgage Bonds. That said parties paid but a nominal price for said bonds, knowing at the time of receiving same that they had been fraudulently issued in manner as aforesaid.

The respondent admits that the said Third Mortgage Bonds so issued in July, 1875, were ante-dated as of May 1, 1875, and the interest made payable thereon on the first of November and May in each year, and respondent says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the said bonds were so ante-dated for the purpose of having the interest thereon become due and payable at an early day, in furtherance of the fraudulent purpose aforesaid, and to enable said parties to the better carrying into effect their fraudulent scheme, of making and causing to be made a foreclosure and sale of the said Pacific Railroad, wherefore respondent says that the orator, having a full knowledge of all the facts in the premises, comes not into court with clean hands, and is not entitled, in equity, to any aid or relief from this honorable court. And this respondent admits that said mortgage of July 10, 1875, contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds thereby secured for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of

said bonds when payable, should not be paid for six months after demand, said trustees were authorized and required, on the written request of the holders of said bonds to the amount of five hundred thousand dollars, the principal and interest of which should then be in arrears or unpaid, to sell the said railroad and all the property by said mortgage conveyed, at public auction, giving notice as specified in said mortgage, and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage, and this respondent answering, says that even under said fraudulent mortgage or deed of trust of July 10, 1875, no interest fell due until November 1, 1875. That as this respondent is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be the said orator fraudulently conspiring, confederating and combining with Andrew Peirce, of Boston, Jos. Seligman, Clinton B. Fisk, Wm. H. Coffin, T. T. Buckley, residents of the State of New York, directors of the Atlantic and Pacific Railroad Company, and James Baker and D. R. Garrison, residents of the State of Missouri and directors of the Pacific Railroad Company, and others whose names are to respondent unknown, the majority of the directors of both said companies fraudulently consenting thereto, in fraud of the rights of all stockholders and of all the bona fide unsecured creditors of said Pacific Railroad filed, and caused and permitted to be filed in his name, at the request and procurement of said parties, and in furtherance of the fraudulent conspiracy and combination so formed and entered into for the defrauding of the stockholders and bona fide creditors of said Pacific Railroad, this said bill of foreclosure that the same was by the said parties caused to be prepared before the said first coupons upon said Third Mortgage Bonds so ante-dated, as aforesaid, fell due.

That the affidavit of the orator to the printed bill, filed in

this court, was made on the third day of November last, and soon thereafter the same was filed in this honorable court at the procurement of the majority of the directors of the Atlantic and Pacific Railroad Company, and the majority of the directors of the Pacific Railroad, and the attorney and law officer of both companies, consenting thereto—all which is against equity and good conscience.

Respondent, further answering, says that if said mortgage or deed of trust of July 10, 1875, is of any binding force or effect, that the said orator, as he is informed by counsel learned in the law, has a full and adequate remedy at law in this, that said deed was executed in the State of Missouri, and all the property attempted to be conveyed thereby is located in said State, that by the terms of said deed of trust the orator is entitled to no other rights in the premises, or different remedy than is therein provided, to-wit.: a sale by the trustee on demand of the holders of at least five hundred thousand dollars of said bonds, the principal on interest on which have been due and unpaid for more than six months. Wherefore respondent says that said orator's bill should be dismissed with costs.

And respondent further answering shows and says that he is informed and believes, and has reason to believe, and upon such information and belief charges the fact to be that the said $1,500,000 of so-called "Income Bonds," issued September 2, 1872, were fraudulently issued by the procurements of the directors of the Atlantic and Pacific Railroad Company, while in possession of the Pacific Railroad, and in control of all its affairs, under said pretended lease; that said "Income Bonds" were fraudulently issued on the pretence of paying a fictitious indebtedness of the said Pacific Railroad for permanent improvements to the same; that the said $2,000,000 of so-called "Improvement Bonds" issued on the 15th day of December, A. D. 1874, were in

like manner fraudulently issued for pretended permanent improvements, which were never, in fact, made on said Pacific Railroad.

That as respondent is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be that the said Pacific Railroad was, on the 29th of June, 1872, when the same was taken into possession by the Atlantic and Pacific Railroad Company, in good repair and condition as a first-class railroad, its bridges mostly new, and its road-bed, ties and rails in good condition, and the floating debt of said corporation decreased to only about $263,000; that the income of said road was amply sufficient if properly applied, to pay all operating expenses of said road, to pay the interest on its bonded debt, and all taxes, and to pay in full the small floating debt then existing. But respondent answering, shows and says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be that Andrew Peirce, Joseph Seligman, Clinton B. Fisk, William H. Coffin, T. T. Buckley, and others, composing a majority of the directory of the Atlantic and Pacific Railroad Company, then controlling the directory of the Pacific Railroad, fraudulently conspiring, combining and confederating with James Baker, D. R. Garrison and others, constituting a majority of the directors of the said Pacific Railroad, to defraud the stockholders and unsecured creditors of said Pacific Railroad, particularly the County of St. Louis, an unsecured creditor to the extent of $700,000; did misappropriate the funds of the said Pacific Railroad to the use of the Atlantic and Pacific Railroad Company, and fraudulently conspiring, and combining and confederating to obtain the control and ownership of the said Pacific Railroad freed from all claim of the stockholders and bona fide creditors, fraudulently issued, and caused to be issued, the said "Income Bonds"

and "Improvement Bonds," and at nominal prices distributed said bonds among themselves and their associates—for the purpose of, and in furtherance of the said conspiracy and combination so formed and entered into to defraud the stockholders and unsecured creditors in manner as aforesaid, they issued and caused and procured by the means and in manner as aforesaid the said "Third Mortgage Bonds" to be issued, and provided for the exchange of said "Income" and "Improvement Bonds" for said "Third Mortgage Bonds" for the purpose as aforesaid.

And respondent shows and avers that the said pretended lease of 29th June, 1872, by which the Atlantic and Pacific Railroad assumed to lease the Pacific Railroad (of Missouri) is void; that the Atlantic and Pacific Railroad, under its charter, was not authorized to make such lease; that its terms and provisions, as made, have been wholly disregarded by the Atlantic and Pacific Railroad Company in this, to-wit:

That the last mentioned company has, as your respondent is informed and believes, for two years past failed to pay the taxes assessed upon the Pacific Railroad—has failed and wholly neglected, since May, 1875, to pay the interest due the County of St. Louis on an unsecured loan of $700,000 due said county; that since the first of October, last, it has been in default in payment of two and a half per cent. dividend on stock of said road, then due, under the terms and provisions of the lease, and respondent denies that it is essential for the interest of all parties interested in said several lines of road mentioned in orator's bill that said roads should be continued to be operated and managed as one road, and avers and says, that it is for the interest of the stockholders of the Pacific Railroad as well as its unsecured creditors, as also the interest of all the bona fide holders of bonds secured by bona fide mortgages on said road, that the same be immediately separated from all

connection with said Atlantic and Pacific Railroad, and immediately relieved from the management and control of any and all parties now having control or management of said Atlantic and Pacific Road, and avers and says that even if said lease be in any manner binding or of any force or effect whatever (which respondent denies), the Atlantic and Pacific Railroad Company has perfected all its rights thereunder.

And respondent is informed and believes, and upon information and belief alleges the fact to be, that the Atlantic and Pacific Railroad Company has not expended any large sums of money in the purchase of new engines and rolling stock for the use of the Missouri Pacific Railroad, and he is informed and believes that the rolling stock and engines of said Pacific Railroad are now of less value than in June 29, 1872. And respondent denies the right of the Atlantic and Pacific Railroad Company to issue obligations in various forms in the name of the Pacific Railroad, or that the last named company is liable for the payment of any such pretended obligations, and denies that the Pacific Railroad Company is liable to pay the principal and interest of the said "Third Mortgage Bonds," dated July 10, 1875, to Baker and Vail, as your orator has alleged, or that any such bonds were issued.

And denies that the said Pacific Railroad is liable to pay the principal and interest of Third Mortgage, bearing date May 1, 1875.

And respondent denies that the Pacific Railroad is unable, if properly managed, to pay its valid and legal obligations in full, as they become due, and denies that any commercial paper, legally and properly made and executed by said Pacific Railroad has, or would have been protested, for the

reason that no such commercial paper has, since June 29, 1872, been properly and legally made by said company.

But respondent admits that the Atlantic and Pacific Railroad Company is without sufficient means to pay and discharge its valid obligations in full, as they become due, as your orator hath alleged. And respondent admits that the interest upon the first and second mortgages upon the Pacific Railroad has been regularly paid as the same became due, and that the premises covered by said mortgages are ample security for the payment of the bonds secured by these two mortgages.

And respondent admits that a receiver should be appointed, as prayed by your orator, but not for the reasons and causes by him alleged, but for the protection of the stockholders and unsecured creditors of said road, whose interests are endangered in the premises, as against the conspiracy and combination of the directors as hereinbefore stated

And respondent denies that said mortgage of July 10, 1875, is valid; that there could be any reasonable doubt as to whether under such mortgage the trustees have the right to proceed at such time and in such manner as is therein designated.

And respondent denies that any equitable right or legal interests of your orator, or other holders of Third Mortgage Bonds could be seriously affected by delay in the institution of proceedings to foreclose said mortgage and obtain possession of said property.

And respondent denies that the orator, if he has any rights in the premises as a bona fide holder of bonds secured by a bona fide mortgage, is remediless in the premises, or is only relienable in a court of equity.

Respondent denies that such remedy as your orator seeks is properly cognizable and relievable in a court of equity. And respondent denies and says that your orator's prayer for a foreclosure of the mortgage of July 10, 1875, executed by said Pacific Railroad should not be granted, for the reasons hereinbefore set forth and shown this honorable court.

And respondent says that by reason of the matters and things set forth in his said answer, no foreclosure should be granted or sale made under a decree of this honorable court, but that said mortgage should be declared to be by reason of the matters herein stated, null and void, and of no binding force and effect in law and equity. All which matters and things this respondent is ready and willing to aver, maintain and prove as this honorable court shall direct.

And by way of cross bill in equity said Thomas P. Akers, a resident of the State of Missouri, humbly complaining, showeth to your honors that he is a stockholder in said Pacific Railroad, the owner of one hundred shares of one hundred dollars each; that the said Pacific Railroad is a corporation incorporated by the State of Missouri, having its office and principal place of business in the City of St. Louis, in said State; that the Atlantic and Pacific Railroad Company is a corporation, incorporated by the act of Congress of the United States, approved July 27, 1866; that its main office is in the City of St. Louis and State of Missouri; that the following named persons constitute the board of directors of the Atlantic and Pacific Railroad Company, to wit: Andrew Peirce, a resident of the State of Massachusetts, Joseph Seligman and Clinton B. Fisk, T. T. Buckley, William H. Coffin, C. V. Stout, J. D. Fish, C. J. Berger, H. T. Verhusen, J. W. Elwell, G. T. Stout and Eugene Robinson, residents of the State of New York, and D. R. Garrison, a resident of the State of Missouri.

Complainant would further show that the following constitute the board of directors of the Pacific Railroad, to wit: Andrew Peirce, resident of the State of Massachusetts, William H. Coffin, resident of the State of New York, and M. J. Lippman, whose residence is to your complainant unknown, Samuel Hays, James Baker, James J. Taussig, E. O. Stanard, D. R. Garrison, D. K. Ferguson, T. B. Edgar, Oliver A. Hart, D. P. Rowland, Webb M. Samuel, residents of the State of Missouri.

Complainant further shows that the said Pacific Railroad owns a line of railroad in the State of Missouri, extending from St. Louis westward to Kansas City, all the appurtenances thereto belonging to the operation of said railroad, and also is the owner of leasehold interest in and operates several lines of railway, connected with its main line heretofore leased to it by various railroad corporations owning such lines, and which said last mentioned line so leased and operated by said Pacific Railroad extended to and from Tipton to Booneville, both of Missouri, a distance of twenty-five miles; from Sedalia to Lexington, both in Missouri, a distance of fifty-five miles; from Kansas City to Leavenworth, Kansas, a distance of twenty-five miles; and from Leavenworth, Kansas, aforesaid, to Atchison, Kansas, a distance of twenty-one miles.

Your complainant further shows that the property of said Pacific Railroad is now encumbered with mortgages and deeds of trust as follows: First, a deed of trust bearing date July 15, 1868, conveying said property interest to Uriel A. Murdock, James C. Punett and Luther C. Clark, as trustees for the securing of the property of said railroad "First Mortgage Bonds," amounting to ($7,000,000) say seven million of dollars. Second, a deed of trust bearing date July 1, 1871, conveying said property to Edwin D. Morgan and Joseph Seligman, as trustees, for the securing

of Second Mortgage Bonds, amounting to three millions of dollars.

That said Pacific Railroad is able to pay both principal and interest of said first and second mortgages according to terms, tenor and condition of the same.

Third. Your complainant further shows, that Rufus J. Lackland and Dwight Durkee are trustees under a deed of trust claimed to have been made by the Pacific Railroad (of Missouri), on or about July 19, 1872, whereby it was attempted convey all the lands then belonging to the Pacific Railroad, and situate in the City of St. Louis, for the securing of so-called Real Estate Bonds, amounting to $800,000.

Fourth. Complainant further shows that Jesse Seligman and James Baker, under a deed or instrument of trust claimed to have been made by said Pacific Railroad, on about October 1, 1873, whereby it was attempted to convey the Carondelet Branch, so-called, extending from Carondelet to the town of Kirkwood, in the County of St. Louis and State of Missouri, for the securing of so-called Carondelet Branch Bonds, amounting to $500,000.

Fifth. That Andrew V. Stout and T. B. Edgar were named as trustees in certain bonds designated as "Income Bonds," issued on 1st September, 1872, chargeable against earnings prior to any dividends on capital stock; that said bonds so issued amounted to $1,500,000, and were issued in manner and are now held as hereinafter stated.

Sixth. That Henry F. Vail and James D. Fish were named as trustees in certain so-called "Improvement Bonds," issued December 15, 1874, amounting to $2,000,000; the same were issued, delivered and now held in manner as hereinafter shown and set forth.

Seventh. That there were also issued about the 19th July, 1875, under the circumstances and in manner as hereinafter by your complainant particularly shown and set forth, $4,000,000 of so-called "Third Mortgage Bonds," bearing date May 1, 1875, and secured by pretended deed of trust, signed by said Samuel Hays, as president of the Pacific Railroad, on the 10th day of July, 1875, a true copy of said deed of trust being printed and filed herewith, for the information of this honorable court as to the particulars thereof. That said bonds are made payable twenty years from said 1st of May, 1875, and bear interest at the rate of seven per cent per annum, payable semi-annually.

Said bonds being in form as follows:

"UNITED STATES OF AMERICA,

No. STATE OF MISSOURI, $1,000.

The Pacific Railroad (of Missouri.)

Third Mortgage Bond.

"The Pacific Railroad (of Missouri), acknowledges to owe, and promises to pay to Henry F. Vail and James D. Fish, or bearer, one thousand dollars in lawful money of the United States, at the office or agency of the Atlantic and Pacific Railroad Company, in the City of New York, on the first day of May, 1895, and the interest thereon at the rate of seven per cent per annum from the first day of May, 1875, in like lawful money, semi-annually, on the first day of November and May in each year, on the presentation of the annual interest warrants at the office or agency aforesaid. This is one of a series of four thousand bonds, each of the denomination of one thousand dollars, and numbered from one to four thousand inclusive, secured by a mortgage of even date herewith, conveying to the above named Henry F. Vail and James D. Fish, trustees for the holder of said

bonds, the Pacific Railroad (of Missouri) with its franchises and appurtenances, including rolling stock, machine shops and depots and real estate, extending from the depot at Seventh street, in the City of St. Louis, two hundred and eighty-three miles to the western boundary of the State of Missouri, at Kansas City. Also the branch railroad of the said Pacific Railroad (of Missouri), which connects with and intersects the main line of the road at Kirkwood, and extending from the point of such intersection to the Mississippi River, at Carondelet, in said State of Missouri, together with all the appurtenances thereto belonging, including depots, engine-houses and water stations, and the lands adjoining, at or near Carondelet aforesaid. This bond may be registered in the books of the said Pacific Railroad (of Missouri), at the option of the holders, after which no transfer thereof shall be made, except by our endorsement thereon, to be made by our authorized agent of said company, unless such transfer so made shall be to bearer, in which case it may thereafter pass by delivery.

"This bond is to be made valid only when authenticated by a certificate endorsed thereon signed by the said trustees.

"In virtue whereof, the said Pacific Railroad (of Missouri) hath caused this bond to be executed by its President and Treasurer, and its corporate seal to be thereto affixed, this day of July, A. D. 1875.

[SEAL.] "SAMUEL HAYS,

"*Treasurer.* *President.*"

Your complainant further shows that on 29th June, 1872, made and executed its pretended deed of lease, under which pretended deed of lease the said last-mentioned company obtained full control of the said Pacific Railroad, as will more particularly appear by the copy of said pretended lease, filed herewith for the information of this Honorable

Court; that said Atlantic and Pacific Railroad having under said pretended lease obtained possession of the said Pacific Railroad and its property on said 29th June, 1872, have since held the same and claim title thereto, thereunder.

But complainant avers and charges that the said pretended lease of June 29, 1872, is illegal and void, for there was no legal right or authority for the making of such lease, as the making of the same was not authorized by the charter of either of said roads, or the provisions contained therein; and particularly that the Atlantic and Pacific Railroad had no authority under its charter to lease said Pacific Railroad and its leased lines, as was attempted to be done by the said lease of June 29, 1872. And respondent shows and charges, that the said lease was wholly void, and that said Atlantic and Pacific Railroad Company should be held to strict account for all moneys received by them while operating said road as pretended lessees.

And complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the amount received by the said Atlantic and Pacific Railroad Company from and on account of the Pacific Railroad, from July 1, 1872, to September 30, 1875, exceeded in amount $15,291,648, for which a strict account should be rendered, as well as for all other moneys received by it as pretended lessee of said Pacific Railroad.

Complainant further says and shows, that if said lease of June 29, 1872, was of any binding force or effect, then the said Atlantic and Pacific Railroad Company had no authority or right to encumber the said leased property, except for the purpose of paying the then existing floating indebtedness of said Pacific Railroad, or for extensions of the same, and for permanent improvements other than such as were

necessary and needful to keep said last-mentioned road in good and sufficient condition as a first-class railroad.

And complainant, on information and belief, avers and charges the fact to be, that no such improvement as under said lease would authorize the issuing of bonds, have ever been made by the Atlantic and Pacific Railroad Company on said Pacific Railroad, except the building of said Carondelet Branch, as hereinafter stated, that there were available assets on hand on 29th June, 1872, to pay all floating indebtedness of the said Pacific Railroad, excepting about $263,000.

And complainant further says, that he is informed and believes, and upon information and belief alleges the fact to be, that the earnings of said Pacific Railroad since June 29, 1872, have been sufficient in amount to pay all operating expenses and interest on its bonded debt then existing, and to pay in full its floating debt.

Complainant further states, that the construction of said Carondelet Branch, as by their own admissions, costs but $382,457.36; that on 15th October, 1873, a mortgage of $500,000 was issued and secured on said branch; that in addition thereto there was a real estate mortgage issued as aforesaid, on 19th July, 1872, securing $800,000 Real Estate Bonds, and that it is, as complainant is informed and believes, claimed by the Directors of the Atlantic and Pacific Railroad Company, that the proceeds of a large portion of same were also used in the construction of said Carondelet Branch; but complainant says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that no proper accounting has been made as to how said $800,000 of Real Estate Bonds were used, or for what purpose the proceeds thereof

were applied. And complainant further shows, that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the said $1,500,000 Income Bonds so issued as aforesaid, on 1st September, 1872, as also the $2,000,000 Improvement Bonds issued as aforesaid, on 15th December, 1874, were issued, and caused to be issued and be delivered, by the Board of Directors of the Atlantic and Pacific Railroad Company, not for the purpose or use of the Pacific Railroad, or for the payment of its debts, or of any debts contracted on its behalf, or for its benefit, as the income of the said road was amply sufficient therefor, but that the same were fraudulently issued and hypothecated for the purpose of paying and securing the debts of the said Atlantic and Pacific Railroad Company, and the individual debts of the Board of Directors of said company, to-wit: Andrew Peirce, T. T. Buckley and others of the Board of Directors of said Atlantic and Pacific Railroad Company, and that no part of said bonds were used for the benefit of said Pacific Railroad or for the payment of its debts, but the same were issued and used in manner as aforesaid, in fraud of the rights of your complainant and all other stockholders of the Pacific Railroad.

That the said Income Bonds so issued on September 1, 1872, were chargeable against the income of said road, and bear interest at seven per cent per annum, and are numbered from one to one thousand, both inclusive, of the denomination of one thousand dollars each, and eight hundred of said bonds numbered from one thousand and one to one thousand eight hundred, both inclusive, being of a denomination of five hundred dollars each; and one thousand of said bonds numbered from one thousand eight hundred and one to two thousand eight hundred, both inclusive, are of the denomination of one hundred dollars each.

That said Improvement Bonds, so issued as aforesaid, on December 15, 1874, and due November 1, 1889, bear interest at seven per cent per annum, payable semi-annually, are all of the denomination of one thousand dollars each, and guaranteed by the Atlantic and Pacific Railroad Company.

And complainant further shows and says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that said Andrew Peirce, Clinton B. Fisk and others of the directors, constituting a majority of said board of directors, fraudulently combined and confederated together, for the purpose of encumbering and misappropriating the property of the said Pacific Railroad, and obtaining possession thereof, freed from any claim of title thereto, or interest therein, of the stockholders of said road and of the unsecured creditors thereof. That in furtherance of said fraudulent purpose, a majority of the directors of said Atlantic and Pacific Railroad Company conspired, as he is informed and believes, with James H. Baker, Daniel R. Garrison and James J. Taussig and others, constituting a majority of the directors of said Pacific Railroad, and that in pursuance of such fraudulent purpose, and for the carrying out of the object and purpose of said conspiracy, the said Income and Improvement Bonds were issued in fraud of the rights of complainant and all other bona fide stockholders in said Pacific Railroad. That said Income and Improvement Bonds, were, as he is informed, fraudulently distributed among the directors of said Atlantic and Pacific Railroad Company, and said Pacific Railroad and their associates, who received the same at nominal prices, and all parties now holding any portion of the same, received said bonds with full notice of the facts above recited, as also of the fact that there was no authority for issuing the same given under said pretended

lease, a copy of which is recorded in each county through which the said Pacific Railroad runs.

Complainant further shows and says, that he is informed, and believes and has reason to believe, and upon information and belief alleges the fact to be, that a majority of the board of directors of the Pacific Railway, wholly disregarding their duties as such board of directors, did, on or about the 10th day of July last, in furtherance of the said conspiracy so entered into as aforesaid, with the directors of the Atlantic and Pacific Railroad Company, did make, execute and deliver, a pretended deed of mortgage upon all the property of the said Pacific Railroad, for the securing, by such deed of trust, a mortgage lien upon said road for four millions of dollars, viz: four thousand bonds ante-dated of May 1st, 1875, of one thousand dollars each, known and designated as Third Mortgage Bonds, with interest coupons attached thereto, for interest at the rate of seven per cent. per annum, payable semi-annually—all of which will more particularly appear by copy of said deed, attached hereto, and filed herewith, for the information of this honorable court. That, in said mortgage or deed of trust, it was provided that said Income and Improvement Bonds, so fraudulently issued as aforesaid, amounting in the aggregate to $3,500,000, might be exchanged by the holders thereof, for a like amount of said Third Mortgage Bonds, so attempted to be secured on said road, in manner and for the purpose aforesaid. All which, as complainant is informed and believes, and upon information and belief alleges the fact to be, was done in furtherance of the fraudulent purpose aforesaid, and for the carrying out of the said conspiracy and combination so entered into as aforesaid. That a pretended consent of the stockholders of said Pacific Railroad to the issuing of said Third Mortgage bonds was obtained, as your complainant is informed and believes, and has reason to

believe, and upon information and belief alleges the fact to be, by false statements and fraudulent representations, made by the board of directors of the Atlantic and Pacific Railroad Company, for whose benefit mainly, the said pretended third mortgage was made and executed, that said false and fraudulent statements and representations were made by means of circulars, distributed among the stockholders of said Pacific Railroad, by the instigation and procurement of the directors of the Atlantic and Pacific Railroad Company. That by said false and fraudulent circulars, and the false statements therein contained, the stockholders of said Pacific Railroad were led and induced to believe that such permanent improvements and extensions had been made to said Pacific Railroad, and that such bona fide indebtedness had been contracted therefor, as to make necessary and expedient the issuing of said four million of bonds, and the execution of said third mortgage for the securing thereof, all which representations so made were false and fraudulent. And had not such false representations been made, as aforesaid, by the directors of said Atlantic and Pacific Railroad, such pretended consent could not have been obtained from the then stockholders of the Pacific Railroad, for complainant is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the directors of said Atlantic and Pacific Railroad Company, caused to be printed and issued among the stockholders of said Pacific Railroad, fraudulent circulars, with a blank power of attorney attached thereto, for the purpose of obtaining authority and ratification by the stockholders, for the issuing of said Third Mortgage bonds and the execution of said third mortgage. That in said circular, as your complainant is informed and believes, false and fraudulent statements of facts were made, as to pretended permanent improvements of said Pacific Railroad, as to the building of new bridges by the lessee, which had not been built, and as

to the existence of a large pretended floating indebtedness of the Pacific Railroad, which did not exist. That by means of these and other false statements in said circular contained, so fraudulently made as aforesaid, the signatures of a large number of stockholders were obtained to the proxies or power of attorney attached to said circular. That such proxy and power of attorney was so attached to said fraudulent circulars, that the same could be detached and removed therefrom without defacement; that such separation was made and fraudulently caused to be made, as your complainant is informed and believes, by the directors of said Atlantic and Pacific Railroad Company, who thereby attempted to secure, by the fraudulent means in manner as aforesaid, the proxies and powers of attorney of the stockholders of said Pacific Railroad, for the ratification of said third mortgage. That, in fact, the pretended ratification of the stockholders was not otherwise secured; that through and by means of such pretended proxies and powers of attorney, thus obtained as aforesaid, that the powers of attorney and proxies so obtained, only authorized the issuing of bonds to pay a bona fide indebtedness of said Pacific Railroad, which, as your complainant is informed and believes, did not then exist. That complainant has tried to obtain and procure one of said fraudulent circulars to produce herewith, but has been unable so to do. That the directors of said Atlantic and Pacific Railroad have in their possession, as your complainant is informed and believes, copies of same, which he asks they may be compelled to produce for the information of this honorable court. Complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the earnings of said Pacific Railroad, while under the control of said pretended lessee, were large and amply sufficient, if properly applied, to pay all operating expenses, interest on mortgage debt, the small floating debt and all improvements

made on said road, other than the Carondelet branch, hereinbefore mentioned, and that the issuing of said Income Bonds of $1,500,000, and said "Improvement Bonds" of $2,000,000, and the said $4,000,000 "Third Mortgage Bonds," and the execution of the pretended mortgage or deed of trust securing same, were in fraud of all stockholders and unsecured creditors of said Pacific Railroad, and was really done, as your complainant believes, not for the benefit of said Pacific Railroad, but in the carrying out of the conspiracy aforesaid, and with the fraudulent purpose of using said bonds in paying and securing the indebtedness of the Atlantic and Pacific Railroad Company, and the individual indebtedness of said Andrew Peirce, Joseph Seligman and others who had heretofore loaned their credit to the said Atlantic and Pacific Railroad Company.

Complainant further says and shows, that he is informed and believes, and has reason to believe, that for the carrying out of said fraudulent purpose, the said four million bonds were thereafterward, on the 19th day of July, 1875, delivered to Henry F. Vail, named with one James D. Fish, as trustees, in said last mentioned mortgage, andsaid Vail, acting at the instance and procurement of the board of directors of the Atlantic and Pacific Railroad, thereafterward, as he is informed, fraudulently proceeded to exchange said "Third Mortgage Bonds," and did make exchanges of the same as follows: That he delivered of the same about $1,900,000 to Andrew Peirce, Joseph Seligman and others, whose names are to your complainant unknown, taking in exchange therefor a like amount of the "Improvement Bonds" so issued as aforesaid, and so hypothecated as aforesaid, for the securing the debt of the Atlantic and Pacific Railroad Company and liabilities of Peirce, Seligman and others, in fraud of the rights of the stockholders and creditors of said Pacific Railroad; that about

one million of said "Third Mortgage Bonds" have, as your complainant is informed and believes, and upon information alleges the fact to be, been exchanged for a like amount of said one million, five hundred thousand "Income Bonds" so issued as aforesaid, on September 1st, 1872, and that of said "Third Mortgage Bonds" so delivered by said Vail in exchange for Income and Improvement Bonds, about one million, nine hundred and fifty thousand dollars of said bonds, are still held by said Andrew Peirce and Joseph Seligman, Daniel R. Garrison and their associates, whose names are to your complainant unknown.

That the same are still held in like manner as said Income and Improvement Bonds were held, as collateral security, for the debts of said Atlantic and Pacific Railroad Company and directors thereof, and are so hypothecated at from fifteen to fifty cents on the dollar. That complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that two hundred and fifty thousand dollars of said bonds, are so held and hypothecated as aforesaid to the "Mechanics' Bank" of the City of St. Louis, of which Oliver Garrison is President. The same are held by said bank at thirty-eight cents on the dollar That about one hundred thousand are held by "The Citizens' Savings Bank" of the City of St. Louis, hypothecated in like manner. That about six hundred thousand are held as collateral by "The Bank of Commerce" of New York. That about six hundred thousand of "Third Mortgage Bonds" are still undisposed of, and are now in the possession and under the control of said Henry F. Vail of New York. That your complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that five hundred thousand of said "Third Mortgage Bonds" were delivered to said Atlantic and Pacific Railroad

Company, and that it is pretended by the officers of said company, that the same were sold and disposed of, at seventy-five cents on the dollar, and were purchased by Clinton B. Fisk and others to your complainant unknown, all which is to the injury and prejudice of complainant, who is informed and believes, and has reason to believe and upon information and belief alleges the fact to be, that all parties purchasing and now holding any of said "Third Mortgage Bonds" received the same with full knowledge and information of the facts hereinbefore stated and recited.

And your complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that the greater portion of said $4,000,000 of Third Mortgage Bonds so issued and delivered as aforesaid, are still held by and under the control of said Andrew Peirce, T. T. Buckley, Clinton B. Fisk, Wm. H. Coffin, M. J. Lippman, Daniel R. Garrison and others of the board of directors of the Atlantic and Pacific Railroad Company, and Pacific Railroad and their associates. Your complainant further shows and says that he is informed and believes, and upon information and belief alleges the fact to be, that the said Coffin, Buckley, Seligman and others, composing a majority of the board of directors of the Atlantic and Pacific Railroad Company, and James H. Baker, James J. Taussig and others, composing a majority of the board of directors of the Pacific Railroad, fraudulently confederating, combining and conspiring to injure and destroy the interest of complainant, as also the interest of all the stockholders and unsecured creditors thereof—conspired, combined and confederated together to obtain possession of said road under the said Third Mortgage so fraudulently and illegally executed as aforesaid—that said Third Mortgage Bonds were so antedated as aforesaid for the purpose of having the coupons for interest thereon become due and payable at an earlier day,

and thereby the better serve the fraudulent purpose of the said Peirce, Seligman, Coffin, Fisk and associates to procure possession of said road by making a sale under said Third Mortgage for non-payment of interest on said bonds. That in furtherance of the fraudulent purpose aforesaid, the said directors have consented, permitted and caused the interest on said bonds for six months to become due before the same had been actually issued four months, and complainant is informed and believes, and has reason to believe, and upon information and belief charges the fact to be, that the said George E. Ketchum was induced to prepare a bill of foreclosure against said road, under said "Third Mortgage," by the instigation and procurement of a majority of the board of directors of said Atlantic and Pacific Railroad Company, and of the directors of said Pacific Railroad. That said bill of foreclosure, as your complainant is informed and believes, was prepared and filed, under the advice and consent of the attorneys of said Railroad Companies—acting under the direction of the directors of said Companies. That the object and purpose of said proceedings, as your complainant believes, was to obtain, by foreclosure of said fraudulent mortgage, the possession, control and ownership of said Pacific Railroad, freed from all claims of complainant, and of all stockholders of said road, and freed from all claims of the bona fide, unsecured creditors therein. That it is not intended or purposed, on the part of the board of directors of either of said Companies, to make any bona fide defense as against said attempted foreclosure of said fraudulent bonds, although, as complainant is informed and advised by attorneys learned in the law and familiar with the facts, and fully believes there exists a good and perfect defense thereto, but that the directors of said roads do not intend to present the same, but do fully intend, in furtherance of the conspiracy and fraudulent scheme as aforesaid, to permit said foreclosure to be wrongfully made for the purpose aforesaid, for the

reason that said "Third Mortgage Bonds" are for the most part held and controlled by the said directors of said road, and their associates. And your complainant shows and alleges, that unless the said board of directors, and officers of the Pacific Railroad are immediately removed from the control and management of its affairs, and the said road and all control and management thereof taken from the board of directors of the Atlantic and Pacific Railroad Company, and wholly removed from the custody and control of any and all parties interested in said "Third Mortgage Bonds," the interests of the stockholders therein, and all bona fide unsecured creditors of said road, will be greatly endangered, if not lost and destroyed, for your complainant is informed and believes, and upon information alleges the fact to be, that the board of directors of the Pacific Railroad have fraudulently consented to, and aided in carrying out the fraudulent purpose of the said Andrew Peirce, Clinton B. Fisk, and their associates—all which is against equity and good conscience and in fraud of the rights of your complainant.

That your complainant believes and apprehends, and has reason to believe and apprehend, that unless the relief hereinafter prayed for is granted, and the control and management of said Pacific Railroad placed in the hands of proper persons, as receivers appointed by this court, irreparable injury will be done to the interest of complainant, and all stockholders and unsecured creditors of said Pacific Railroad.

Complainant further says, that he is informed and believes, and upon information and belief charges the fact to be, that said Atlantic and Pacific Railroad Company has become, and is in such insolvent and bankrupt condition that it cannot, on its part; longer keep and comply with the

terms and conditions of said pretended lease, in this: that it is unable to pay the dividends on the stock of the Missouri Pacific Railroad, as agreed. That the same has remained due and unpaid since the 1st day of October, last. That taxes, which by the terms of said pretended lease, were to be fully paid and discharged by the said Atlantic and Pacific Railroad Company have, for two years last past, remained due and unpaid as aforesaid, amount to about the sum of $200,000. That interest due the County of St. Louis, on a loan of $700,000, which interest is payable monthly, at the rate of seven per cent per annum, is due and unpaid since May, 1873. That said Atlantic and Pacific Railroad Company is unable, on account of its insolvent condition, to pay the amount so due, or to properly care for the said property of the said Pacific Railroad

That it is not pretended or claimed that said Atlantic and Pacific Railroad is in other than an insolvent condition. Wherefore, complainant says, it is against equity and good conscience, that said Atlantic and Pacific Railroad Company should longer have or exercise any control over the affairs of the said Pacific Railroad. Complainant further shows, that the present board of directors of said Pacific Railroad, have only a nominal interest in the stock of said road, not exceeding three hundred shares of stock. That their management of its affairs is, and has been, to the great prejudice and damage of the interest of the stockholders thereof. That complainant is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that a majority of said directors have combined, and are now combining, with said Peirce, Fisk and others, against the interest of your complainant, and in aid of the holders of said "Third Mortgage Bonds" for the purpose of creating a fraudulent and pretended indebtedness, equal in amount to the full face of said bonds, and under said

fraudulent mortgage, to sell said Pacific Railroad at a great sacrifice, and to thereby destroy the interest and property of the said stockholders, and of this complainant and all the bona fide unsecured creditors of said road.

Your complainant further states that the present board of directors, as he is informed and believes, were elected at the solicitation of and in the interest of the Atlantic and Pacific Railroad Company, that three of them belonged to the board of directors of the last mentioned company, and one is the attorney of said Atlantic and Pacific Railroad Company; as also attorney of the Pacific Railroad. That the present President of the Pacific Railroad is auditor of the Atlantic and Pacific Railroad Company, and receives the greater portion of his salary therefrom, so that of those who compose a lawful quorum of said board of directors of said Pacific Railroad, there is a sufficient number of directors, who are either directors in said Atlantic and Pacific Railroad Company, or officers of the same, to constitute a majority.

Complainant further states and shows, that the Atlantic and Pacific Railroad Company, now claims that there is due from the Pacific Railroad to said Atlantic and Pacific Railroad Company, upwards of one million, two hundred and ninety-seven thousand, two hundred and twenty-seven dollars, and twenty-nine cents, and is now engaged, as your complainant is informed and believes, in making a pretended settlement and fraudulent allowance of claims not justly due, whereby it is sought to unjustly fasten upon the Pacific Railroad a large amount of fraudulent claims. Your complainant further states he is informed and believes, that the rolling stock purchased by the Atlantic and Pacific Railroad Company, justly and equitably belongs to said Pacific Railroad. That it has been marked "A. & P. R. R." in violation of the spirit, intent and provisions of the said lease

under which the directors of both said Railroad Corporations were pretending to act.

Complainant further represents and shows that if the "Third Mortgage" be held to be a binding encumbrance against said Pacific Railroad, and a valid lien upon the said Railroad, by reason of the bonds secured thereby being held by bona fide purchasers without notice of its illegality (which complainant denies), that then upon any proper and fair accounting, the said Atlantic and Pacific Railroad Company would, as he believes, be found to be largely indebted to said Pacific Railroad, under the terms of said lease of June 29th, 1872, that, as he believes, said lease should be found to have been illegally made, and an accounting ordered, then upon a fair accounting the Atlantic and Pacific Railroad Company will be found to be indebted to the Pacific Railroad in a sum, as your complainant believes, of not less than $1,000,000. For, as complainant is informed and believes, and upon information and belief alleges the fact to be, the Atlantic and Pacific Railroad Company is the debtor of the Pacific Railroad in a sum of fully $1,000,000, on a fair and equitable accounting of accounts stated between said roads. That the earnings of the Pacific Railroad received by the Atlantic and Pacific Railroad Company, together with the amount by it received for the 800,000 Real Estate Bonds, issued July 19th, 1872, as also upon the 500,000 Carondelet Branch Bonds, issued August 1st, 1873, have largely exceeded in the agregate all moneys expended by the Atlantic and Pacific Railroad Company for or on account of the Pacific Railroad, in and from whatsoever.

Complainant further shows that the Atlantic and Pacific Railroad Company does not own any line of railroad into the city of St. Louis, but that its road-bed commences at the town of Franklin, on the line of the Pacific Railroad, about

forty-two miles westwardly from the city of St. Louis. That the said Atlantic and Pacific Railroad Company have no means of reaching the city of St. Louis except over the said Pacific Railroad, that complainant is informed and believes, and upon information and belief alleges the fact to be, that said Atlantic and Pacific Railroad Company is now engaged in inducing the said board of directors of the Pacific Railroad to enter into permanent running arrangements with said Atlantic and Pacific Railroad Company by means of which they shall for a long term of years fasten upon the Pacific Railroad an arrangement made by the present board of directors of said road, who are improperly influenced by the directors of the said Atlantic and Pacific Railroad Company, and have themselves only a normal interest in said Pacific Railroad. That such arrangements so likely to be entered into as aforsaid would never, as your complainant believes, be entered into by the stockholders of said Pacific Railroad, or by any board of directors acting with an eye singly to the interest of said last mentioned corporation, and your complainant charges, that unless restrained and prevented, the said board of the Pacific Railroad will proceed to make such running arrangements.

Your complainant further states and shows that the next annual election of said Pacific Railroad does not take place until March next, and that at that time only four new directors are to be elected, so that no change can then be made sufficient to protect the interest of the stockholders of said road as against the fraudulent manipulations of the present board of directors, wherefore, complainant says, that by reason of the matters as herein before set forth and alleged, no proper or adequate remedy and protection can be afforded to complainant and other stockholders of said road, except by decree against the said directors of the Pacific Railroad for the causes and reasons as herein before set

forth, and by an order for the election, by the stockholders, of an entire new board of directors of said Pacific Railroad, as hereinafter prayed. Complainant further states, that under the terms of said lease, the Atlantic and Pacific Railroad Company's directors, conspiring and confederating with the directors of the said Pacific Railroad, have, as complainant is informed and believes and has reason to believe, and upon information and belief charges the fact to be, assumed to direct and control, and have directed and controlled the operations and resolutions, and acts of the directors of the Pacific Railroad, and your complainant states, that said directors of the Atlantic and Pacific Railroad Company, have so used their power and influence under said pretended lease that they have in the carrying out of said conspiracy and confederation, as your complainant is informed and believes, procured the passage of resolutions and orders by the board of directors of the Pacific Railroad, to fraudulently encumber said road, its franchises, property and appurtenances, by the issuing of said bonds, and by the execution of said illegal mortgages, so as to sacrifice at auction sale, for a sum far less than its real value, the whole property and franchises of said Pacific Railroad, to the great injury, prejudice and loss of your complainant and all other stockholders and unsecured creditors of said Pacific Railroad. Complainant further represents and shows, that the said Pacific Railroad is a very large and valuable property, that its income, if honestly applied to such purpose, is more than sufficient as your complainant believes, to pay the interest on all its bonds, and its running expenses and repairs and taxes, that with proper management it is abundantly able to pay all its just debts, and its stock is of great value, exceeding $1,000,000.

Complainant further shows, that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that among the parties with whom the directors of the said Atlantic and Pacific Railroad

have placed and hypothecated said "Third Mortgage Bonds," and who now hold said bonds, in amounts as hereinafter stated, are the following: Andrew Peirce, $100,000; Joseph Seligman, $150,000; George F. Stone, $30,000; James B. Colgate & Co., $150,000; Eugene A. Robinson, $50,000; Frederick Butterfield, $67,000; Robert Lennox Kennedy, by Henry F. Vail, $100,000; John Jacob Astor, $100,000; C. K. Garrison, $100,000; N. Waychoff, $10,000; A. J. Backman, $5,000; W. J. Libby, $10,000; C. Berger, $10,000; T. T. Buckley, $10,000; J. D. Fish, $10,000; and that it is claimed and pretended by the directors of said Pacific Railroad, that a large portion of said "Third Mortgage Bonds," viz.: one million eight hundred and sixty thousand dollars, are still the property of the Atlantic and Pacific Railroad Company; but as to the exact amount of said "Third Mortgage Bonds" held by the said Atlantic and Pacific Railroad by said Andrew Peirce, of Boston, Joseph Seligman, George F. Stone, James B. Colgate & Co., Eugene A. Robinson, Frederick Butterfield, Robert Lennox Kennedy, John Jacob Astor, C. K. Garrison, N. Wayckoff, A. J. Backman, W. J. Libby, C. Berger, T. T. Buckley, J. D. Fish, all residents of the State of New York; "The Bank of Commerce," incorporated under the laws of the State of New York, and there doing business; The Mechanics Bank and said Citizens Bank, incorporated under the laws of the State of Missouri, and in said State doing business, and D. R. Garrison, resident of Missouri, your complainant has no positive knowledge, but avers and says that he is informed and believes, and has reason to believe, and upon information and belief alleges the fact to be, that said Andrew Peirce, Daniel R. Garrison and Joseph Seligman have full knowledge and information as to all the holders of said Income, Improvement and Third Mortgage Bonds, and amounts respectively held by them.

Complainant further states that he is informed and believes, that in pursuance of their purpose for defrauding complainant and all other stockholders, and unsecured bona fide creditors of said Pacific Railroad, the said directors of said Pacific Railroad, conspiring and combining with the directors of the Atlantic and Pacific Railroad Company, as aforesaid, wrongfully neglected and omitted, in the pretended deed of trust, given to secure the payment of said $4,000,000 of "Third Mortgage Bonds," to secure the payment, or to make provision for securing the payment of the unsecured debt due to the County of St. Louis of $700,000, and by such wrongful neglect and omission, they gave an illegal preference to the holders of said Income and Improvement Bonds, in securing the payment of the same, by said Third Mortgage Bonds, and by each exchange of said Third Mortgage Bonds, for said Income and Improvement Bonds, wrongfully and illegally hindered and delayed the County of St. Louis in the collection of said debt, by which neglect, omission and wrong doing of said directors, they exposed the Pacific Railroad to be placed in bankruptcy by said County of St. Louis, under the laws of the United States in such cases made and provided. That the said County of St. Louis, availing itself of its legal rights in the premises, on the 28th of October, last, within four months of the time when said third mortgage was filed, and within sixty days of the exchange and delivery of Third Mortgage Bonds, through Henry F. Vail, trustee of said Pacific Railroad, to the holders of unsecured Income and Improvement Bonds, the said County of St. Louis, as an unsecured creditor, whose claim is undisputed by said Pacific Railroad, filed its petition in bankruptcy against said road, on the grounds and for the reasons aforesaid; but as complainant is informed and believes, and upon information and belief alleges the fact to be, the said County of St. Louis is willing to make an amicable and liberal adjustment

and fair concession as to its legal rights in the premises, if said Pacific Railroad is without unreasonable delay placed in the hands of suitable and proper receivers, who will have due and proper regard for the rights and interests of all parties in the premises which, complainant shows and says, would be largely to the advantage of the stockholders of said Pacific Railroad. Complainant further shows and says that said directors, as he is informed and believes, in pursuance of said fraudulent purpose to injure and defraud complainant and other stockholders and creditors of said Pacific Railroad, so made and designed said trust mortgage deed, given to secure the payment of said Third Mortgage Bonds, as not to make necessary any proceedings for foreclosure, but provided therein for sale by trustees, in manner as provided by the laws of the State of Missouri, after a default for six months, wherefore complainant says, that until the expiration of the days of grace, so given by the terms of said deed, no foreclosure or sale can be properly made thereunder or decree entered therefor, even if said deed be of binding force and solidity, which complainant denies; and as to said pretended lease, complainant avers and says that neither the Congress of the United States or the Legislature of the State of Missouri, have at any time ever authorized either the said Atlantic and Pacific Railroad Company or the Pacific Railroad to make such pretended lease, and that the making of said pretended mortgage was in violation of the laws of the United States, forbidding the giving of preference in contemplation of bankruptcy; and complainant avers and charges that he believes such was the purpose of the directors of said road in making the same.

Complainant further says, that he files this, his cross-bill, not only for his own benefit as a stockholder in said Pacific Railroad, but for the benefit of all other holders or owners of the shares of said capital stock who may come in

and contribute to the cost and expense necessary to the prosecution of the same. Complainant further shows, that it is necessary to a proper determination of the rights of the several parties in the premises, the following persons should be made parties hereto, viz.: Wm. H. Coffin, of New York; Andrew Peirce, of Boston, Mass.; M. J. Lippman, of New York; James J. Taussig, Samuel Hays, E. O. Stanard, Danl. R. Garrison, D. K. Ferguson, T. B. Edgar, Oliver A. Hart, D. P. Rowland, all of St. Louis; the above being directors, as aforesaid, of the Pacific Railroad (of Missouri). Also, T. T. Buckley, C. J. Berger, Clinton B. Fisk, H. T. Versusen, J. W. Elwell, Eugene Robinson, A. V. Stout, all of New York, and Directors in the Atlantic and Pacific Railroad Company; also, George F. Stone, James B. Colgate, Frederick Butterfield, Robert Lennox Kennedy, C. K. Garrison, M. Waychoff, and A. J. Backman, W. J. Libby, and John Jacob Astor, all residents of the city of New York, and alleged holders of said "Third Mortgage Bonds," as also the Bank of Commerce of New York, the Citizens' Bank of St. Louis, all alleged holders of said Mortgage Bonds, to the end that they may have opportunity to make full answer to the matters and things as stated, set forth and charged by your complainant, and may be severally required by this Honorable Court to make full answer to such interrogatories as may be properly propounded by complainant herein. And to the end that it may be shown why, if cause there be, that your petitioner should not have the relief hereinafter prayed for, your complainant humbly prays this Honorable Court to require that the said several officers of the Atlantic and Pacific Railroad Company, and the said several officers of the said Pacific Railroad; and the said A. V. Stout and T. B. Edgar, named as trustees in said Income Bonds, and the said Henry F. Vail and James D. Fish, named as trustees in said "Third Mortgage," and named as trustees in said Improvement

Bonds, upon their several and respective corporal oaths, and according to their best information, belief, remembrance or knowledge, full, direct and perfect answers make to the several interrogatories hereinafter numbered and set forth, as they are hereinafter respectively required to answer—that is to say: the said Andrew Peirce, Joseph Seligman, and each of the others herein named as directors of the Atlantic and Pacific Railroad Company, are required to separately answer upon their oaths as above-named.

First. By whom are the said one million five hundred thousand dollars "Income Bonds," the said two million dollars "Improvement Bonds," and the said $4,000,000, say four million dollars, "Third Mortgage Bonds," now held and owned; and what price and sum have been paid by the holders for the bonds so held by them; to disclose and state fully by whom said bonds are now held, and for whose use and benefit?

Second. What sums of money have you received from the sale of the said $800,000 Real Estate Bonds of July 18, 1872; on the $1,500,000 Income Bonds of September, 1872; on the $500,000 of Carondelet Branch Bonds, dated October 1, 1873; on the $2,000,000 "Income Bonds," dated December 15, 1874, and on the $4,000,000 Third Mortgage Bonds, bearing date May 1, 1875, to whom were the same sold or otherwise disposed of? State specifically as to each of the said classes of bonds, and whether said bonds referred to have been sold, or are the same now hypothecated. If sold or hypothecated, for what price or sum, to whom, and for what purposes have the moneys received therefor been applied, and for what purpose, and to liquidate what debts were the moneys received first applied?

Third. What sums, if any, have been expended in permanent improvement of the Pacific Railroad? State specifically by itemized account.

Fourth. What have been the gross earnings and receipts of the Pacific Railroad during the whole time the same has been held under the pretended lease to the Atlantic and Pacific Railroad Company, and what use has been made of the same, and what have been the operating expenses, and what, if any, other expenses have been incurred during the same period? State specifically the items of earnings, receipts and expenses; answer specifically as to items and dates.

Fifth. What was the cost of the building and equipping of the Carondelet branch of the Pacific Railroad, state specifically in items and dates.

Sixth. What amount of the proceeds realized on Income Bonds and Improvement Bonds, and on Third Mortgage Bonds, were used in paying pretended rental dividends on the stock of the Pacific Railroad?

Seventh. State specifically the source from which all moneys paid as dividends were derived.

Eighth. Whether $1,050,000 paid as dividends to stockholders were charged in the accounts of said company as disbursements in transportation department, state specifically, how the dividends to stockholders were charged, in the accounts of the said Atlantic and Pacific Railroad Company, and in the accounts of said Pacific Railroad.

Ninth. What amount of money has the Atlantic & Pacific Railroad Company expended from the 1st of July, 1872, until the———— day of November, 1875, when the receivers of said road were appointed in the case of Littlefield vs. Atlantic and Pacific Railroad Company? And what sum is now due for taxes, and what amount of taxes has been assessed on said premises within the time named?

Tenth. What amount of money, if any, has the Atlantic and Pacific Railroad Company expended, on or account of said Pacific Railroad, during the time designated in the last interrogatory, not properly chargeable to operating expenses, and what, if any, moneys have been expended, in excess of renewals and repairs necessary to keep said last mentioned road in good and sufficient repair as a first-class railroad?

Eleventh. Have you at any time under the supposed authority contained in said pretended lease, ever requested, solicited or demanded of the directors or officers of the Pacific Railroad Company, that they should make, execute and deliver, either or which of the above-named bonds and mortgage? And which, and how many of said bonds, and to which of your officers, and for what purpose were said bonds or any of them, delivered to you or to any of your directors or officers?

The said Andrew Peirce, Wm. H. Coffin, James Baker, Daniel R. Garrison, Oliver A. Hart, Samuel Hays, M. J. Lippman, Webb M. Samuel, E. O. Stanard, John J. Taussig, T. B. Edgar, D. K. Ferguson, D. P. Rowland, directors of said Pacific Railroad Company are required upon their several oaths, and according to their best knowledge, remembrance or belief, to answer the following interrogatories —to-wit:

First. Now, or have you at any time, sympathized or countenanced or advised with the parties represented in or interested with the said George E. Ketchum in his bill for foreclosure of the said pretended Third Mortgage upon the Pacific Railroad, or have you at any time counseled with any of his attorneys, solicitors or counsel upon the subject matter of said suit? State fully any and all things which

you or either of you have said or done to bring about the commencement of said suit to facilitate or aid its prosecution? State fully as to your intentions, that you have each and severally entertained as to permitting said Ketchum to successfully prosecute his said suit.

Second. Are you, or either of you, the owners of any of said Third Mortgage Bonds bearing date May 1, 1875, or does any other person for you or with whom you are connected or related, own any of said bonds, or have you, or either of you, any interest express or implied, contingent or otherwise, in any of said Third Mortgage Bonds? If so, state fully your interest in said bonds, what your or their interest is in the same, and what sum of money they cost you, and whether you have paid for the same. State fully as to any interest you now have, or at any time heretofore have had, or that your wives or children now have or at any time have had in said Third Mortgage Bonds, said Income Bonds or said Improvement Bonds? What, if any, is your interest in the stock of the Pacific Railroad, how many shares of its stock have you at any time held, or owned, or been interested in, and do you or either of you now own or have any interest in the stock of said road, and in whose name does the same stand on the books of said Company?

The said Andrew Peirce, Wm. H. Coffin, James Baker, Daniel R. Garrison, John J. Taussig, Clinton B. Fisk, Samuel Hays, M. J. Lippman, T. T. Buckley are required, upon their several oaths, according to their best knowledge, remembrance or belief, to answer the following interrogatories:

First. What was the purpose of issuing the said Third Mortgage Bonds on the Pacific Railroad, and of ante-dating the same as of May 1, 1875, and of securing the same by

pretended mortgage or deed of trust of July 10, 1875, of including thereunder all property of every kind and description belonging to the Pacific Railroad?

State whether the same were issued for the purpose of making a foreclosure of said road, and whether you or either of you have at any time between yourselves, or between yourselves and other parties, an understanding and declared purpose of foreclosing, or causing to be foreclosed, said mortgage?

Second. Did you, or either of you, confer or advise with the attorneys, and solicitors or counsel appearing for said Ketchum in his bill of foreclosure now pending upon the subject matter of said suit? State fully all things which you, or either of you have done to bring about the commencement of said suit and to facilitate or aid its prosecution.

Third. State the amount of said Third Mortgage Bonds of May 1, 1875, that you jointly or severally own, hold or control, when and for what consideration and price you obtained the same? and what amount of stock of said Pacific Railroad you, or either of you, hold, or at any time have held, and when, with reference to the time when said Third Mortgage Bonds were issued, you sold or disposed of any of the stock of said road?

Fourth. State whether you are now, in any manner, directly or indirectly, aiding, assisting, counselling or countenancing the said Ketchum in his attempt to foreclose the said "Third Mortgage Bonds," or whether you, or either of you, have employed attorneys, solicitors or counsel to aid, directly or indirectly, in the making of such foreclosure.

Fifth. What was the object of the issuing of the $1,500,000 Income Bonds, and $2,000,000 Improvement Bonds?

Were the same, or any portion of the same, used or hypothecated for debts contracted on account of the Atlantic and Pacific Railroad Company, or were the same, or any portion of the same, used or hypothecated for the raising of money to pay rental dividends on stock of Pacific Railroad?

Sixth. Have you, or either of you, been interested in any contract or agreement with the Pacific Railroad, or with the Atlantic and Pacific Railroad Company, for the purchase or sale of the bonds or stocks of said roads. If so, when were such purchases made by you, and at what time did you sell any portion of the same, and to what extent do you now own, hold or control the same, or any interest therein.

Seventh. At what price did you, or either of you, receive said Income Bonds, Improvement Bonds and Third Mortgage Bonds; what price did you actually pay for said bonds, and by whom are the same now held, so far as known to you?

Eighth. Did you, or any of you, with any other person or persons, or corporations, agree, at any time, to purchase of the capital stock of the Pacific Railroad, with the view and for the purpose of so controlling the same, as to effect a lease of said road to the Atlantic and Pacific Railroad Company, and was said pretended lease of June 29th, 1872, effected and secured to the Atlantic and Pacific Railroad Company through and by means of such combination; state fully as to this, and in what manner and form you, or either of you, purchased said stock, and on whose account, and who shared the profits with you, or either of you, by way of commissions or otherwise, for the purchasing, carrying and selling said stock.

Ninth. What office or position of trust have you, or either

of you, held in the said Pacific Railroad, or the said Atlantic and Pacific Railroad Company, since February 1st, 1871, and what office or position of trust do you now hold in either of said corporations?

Henry F. Vail and James D. Fish, trustees, are required to answer, upon their separate oaths, and according to their best knowledge, information and belief, the following interrogatory:

First. What amount of the said Third Mortgage Bonds, bearing date May 1st, 1875, and said Improvement Bonds, bearing date December 15th, 1874, were delivered to them, or either of them; what portion of the same have been disposed of by them, and in what manner, at what time and manner any portion of the same were delivered by them, and where, and under whose control said bonds now are, so far as known to them, and how held, and what amount of Income Bonds, of September 1st, 1872, are now within their possession and control; and if not all within their control, to state fully by whom the same are now held, so far as known to them.

Your complainant avers that he files this, his cross-bill, because he is without remedy at law, wherefore your petitioner humbly prays this honorable court—

1st. To make the aforesaid and following named Wm. H. Coffin, Jesse Seligman, residents of New York; Andrew Peirce, a resident of Boston, Massachusetts; M. J. Lippman, a resident of the State of New York; James J. Taussig, Sam'l Hays, E. O. Stanard, D. R. Garrison, D. K. Ferguson, T. B. Edgar, Oliver A. Hart, D. P. Rowland, residents of the State of Missouri; T. T. Buckley, C. J. Berger, H. T. Versusen, J. W. Elwell, A. V. Stout, Eugene

A. Robinson, George F. Stone, James B. Colgate, Frederick Butterfield, Robert Lennox Kennedy, C. K. Garrison, N. Waychoff, A. J. Backman, W. J. Libby, John Jacob Astor, all residents of the State of New York; The Bank of Commerce of New York, Merchants Bank of St. Louis, Missouri, and Citizens Bank of St. Louis, Missouri, parties hereto, and to issue its proper process therefor.

2d. To allow the complainant, whenever he is able to learn who the persons are who confederated and combined with the persons herein named, as above set forth, to make the same parties hereto by proper process, to the end that they may be required to make answer hereto.

3d. To allow the complainant, whenever he is able to learn the names of the holders of any of the said $1,500,000 Income Bonds, or said $2,000,000 Improvement Bonds, or the said $4,000,000 Third Mortgage Bonds, whose names are not hereinbefore set forth, to make them or any of them parties hereto, to make answer to this cross-bill of complainant.

4th. That upon finding the facts to be true, as alleged, you will order and decree said pretended lease, from said Pacific Railroad to said Atlantic and Pacific Railroad Company, to be brought into court, and if found to be a valid lease, that you will cancel the same for non-fulfillment of the covenants therein contained, and restore the leased premises to said Pacific Railroad, and order the payment of such damages for said breaches of covenant as to equity appertains. If said lease is found to be an unauthorized and void document, and that said Atlantic and Pacific Railroad Company have been in possession of said premises known as the Pacific Railroad, wrongfully, that you will restore the possession of said leased premises to said Pacific Railroad, and

order and decree the Atlantic and Pacific Railroad Company to pay such damages for said wrongful occupation of said premises as to equity appertains.

5th. Upon finding the facts to be true, as alleged, concerning the Income Bonds, the Improvement Bonds and the Third Mortgage Bonds, so-called, that you will order the bonds, under suitable penalties, and upon such terms and conditions as are proper and equitable, to be brought into court and declared void and cancelled; that you will order said trustees, viz: Jesse Seligman and James Baker, to bring into court and cancel the instrument or deed of trust, under which they act, viz: the deed described in said bill of complaint as being claimed to have been made by the Pacific Railroad, dated October 1st, 1873. And also that you will order said trustees, Henry F. Vail and James D. Fish, to bring into court, that the same may be declared void, and to cancel the instruments or deeds of trust, under which they act and claim authority, to wit: said deed dated July 10th, 1875, whereby it was attempted to secure the payment of $4,000,000 of so-called Third Mortgage Bonds, that the same may be declared void and cancelled and held for naught. As also the instrument dated December 15th, 1874, under which they claim, and pretend to have authority to act, as trustees for the holders of said Improvement Bonds, that it may in like manner be cancelled and held for naught.

6th. That upon finding said allegation to be true, respecting the defendants herein named as directors of the Pacific Railroad, and that they have, either by their acts of omission or commission, injured your complainant and other stockholders of said railroad, that you will remove each and every one of them from the office of director, and either appoint other directors in their places, or direct a meeting of the stockholders to be held, at which the stockholders shall

be authorized to elect other directors to supply the places of those removed by the court.

7th. That the court will discharge the receivers heretofore appointed in the case of Littlefield vs. The Atlantic and Pacific Railroad Company, herein before referred to, from the further custody, control or management of said Pacific Railroad, or of any of its property, franchises or appurtenances, and that you will require said receivers to render an account of their management and doings, so far as the Pacific Railroad is concerned.

8th. That the court will appoint its receivers for said Pacific Railroad, to take possession of the entire property of the Pacific Railroad, to care for, and operate and manage said railroad, with all the usual powers of receivers appointed by Courts of Equity, under the direction of this court.

9th. That you will order an account to be stated between the Pacific Railroad and Atlantic and Pacific Railroad Company, and ascertain what indebtedness, if any, exists from one company to the other; and if, upon the statement of said account, the said Atlantic and Pacific Railroad Company shall be found indebted to said Pacific Railroad, that you will order said indebtedness to be paid, and declare the same to be a lien upon the property of the said Atlantic and Pacific Railroad Company, prior to any mortgage or judgment made by or against said company since July 1, 1872, the time when the Atlantic and Pacific Railroad Company took possession of the Pacific Railroad.

10th. That the said court will order a meeting of the stockholders of the said Pacific Railroad, to be held in the city of St. Louis, at a time to be fixed by said court, for

the purpose of an election for a full board of directors of said Pacific Railroad, and that in the meantime, the present board of directors and officers of said corporation, be enjoined and restrained from settling or adjusting any accounts as between the Pacific Railroad and the Atlantic and Pacific Railroad Company, or from making any new running arrangements between the two railroads, except of a temporary nature, and for such other order and decree in said premises as justice may require and the Court shall deem meet.

11th. That an accounting may be had between the said Pacific Railroad and Atlantic and Pacific Railroad Company, for the purpose of determining the rights of the several parties in the premises, and that an order of injunction may be granted and issued by this Honorable Court restraining all parties holding any of said "Income Bonds," and Third Mortgage Bonds, and Improvement Bonds, from disposing of the same.

12th. Or that the Court will grant to your complainant such other further and different relief as to equity and good conscience appertains. And your petitioner, in duty bound, will ever pray.

HILL & BOWMAN,
Solicitors for Thos. P. Akers.

GLOVER & SHEPLEY, and
THOS. C. REYNOLDS,
of Counsel.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI. } ss.

Thomas P. Akers, deponent, being duly sworn on oath says, that he has read the above and foregoing answer and

cross-bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters which are stated therein on information and belief, and as to those matters this deponent believes them to be true; and deponent further says, that unless the relief prayed in said cross-bill be granted, his interest will be greatly damaged.

THOS. P. AKERS.

Subscribed and sworn to before me, the 5th day of February, 1876.

M. M. PRICE, Clerk.
By A. P. SELBY, D. C.

MINUTES OF

STOCKHOLDERS' MEETING,

(Pacific Railroad of Missouri,)

HELD IN

NEW YORK, DECEMBER 28TH and 29TH, 1875.

F. A. OTIS, SECRETARY.

Pacific Railroad Company (of Missouri).

The transfer books are to be closed on Friday the 24th inst. It is important that each stockholder should have his stock in his own name, or in the name of a friend. The stockholders meet on the 28th. Every stockholder should be present in person or by proxy. The directors at that meeting promise to tell what they have done with the earnings of the Company, and with the proceeds of the increased

mortgages and the unfunded debt which they have created.

Proxies can be had at No. 25 William street, or can be sent to either of the undersigned:

N. A. Cowdry,
Peter Marie,
Wm. H. Morrell,
John S. Denny,
F. A. Otis,
Geo. R. Fearing,
Jacob Cromwell,
} Committee of Stockholders.

Office of the Pacific Railroad of Missouri, St. Louis, Mo., December 15th, 1875.

A special meeting of the stockholders of the Pacific Railroad of Missouri will be held at No. 3 Broad street, in the City of New York, on Tuesday, December 28th inst., at 12 o'clock noon. The transfer books, both here and in New York, will be closed on Friday, the 24th inst., at noon.

Samuel Hays, President.

Every stockholder of the Missouri Pacific Railroad who desires honest information relative to the condition of this property and its relations to the Atlantic and Pacific Railroad, is earnestly and respectfully requested to be present.

A. Peirce, Prest. A. & P. R. R.

PACIFIC RAILROAD OF MISSOURI.

MINUTES OF STOCKHOLDERS' MEETING, HELD AT NO. 3 BROAD ST., N. Y., ON DEC. 28TH, 1875, AT 12 O'CLOCK M.

Meeting called to order. Mayor Britton, of St. Louis, was

elected chairman of the meeting and Mr. F. A. Otis, of New York, appointed to act as Secretary.

The following resolution was then offered by Mr. Peter Marie:

(1.) "*Resolved*, That each speaker be limited to fifteen minutes." Resolution was then adopted by the meeting.

(2.) Mr. Cowdry then offered the following resolution:

"*Resolved*, That the Chairman be requested to ask each of the directors present, whether or no, they will abide by and comply with the action of this meeting when expressed by a stock vote." This resolution was finally laid on the table at the request of Mr. Cowdry.

Col. Baker then offered the following resolution:

(3.) "*Resolved*, That the directors of the Company have an opportunity to make a report and to explain the same in their own way."

This resolution was also laid on the table.

(4.) It was then moved, seconded and carried, that no question shall be put to the meeting requiring a stock vote until 3 o'clock P. M.

(5.) It was then moved by Mr. Morrell and carried, that the directors have a full opportunity to make their explanations.

Mr. Hays then commenced to read and explain the report of the Atlantic and Pacific Railroad, prepared by Mr. Peirce, as lessee of the Missouri Pacific Railroad, which he finally requested Colonel Fisk to read to the meeting. Mr. Fisk then read the report.

It was moved, seconded and carried, that the thanks of the meeting are due to Mr. Fisk for reading the report.

Mr. Denny then offered the following resolution, seconded by Mr. Morrell:

(6.) "WHEREAS, Mr. Peirce, in his report, assumes the entire responsibility of the management of the Pacific Railroad of Missouri, therefore,

"*Resolved*, That the president and directors of the Pacific Railroad, of Missouri, be, and are hereby relieved, from any charge of intentional mismanagement."

After discussion, this resolution was withdrawn by Mr. Denny with consent of Mr. Morrell.

Mr. Bowman then read a provision of the lease to the Atlantic and Pacific Railroad from the book of laws and document of the Atlantic and Pacific Railroad.

The meeting then adjourned until to-morrow, Wednesday, December 29th, at 12 o'clock M. Mr. Bowman to retain the floor at that time.

FRANK A. OTIS, Secretary.

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3 BROAD STREET, N. Y., DECEMBER 29TH, 1875.

Meeting called to order at 12 o'clock M., Mayor Britton in the chair; F. A. Otis, Secretary.

Mr. George, of Boston, then offered the following resolution (Mr. Bowman temporarily yielding the floor.):

(1.) "*Resolved*, That a committee of five stockholders be appointed to investigate the affairs of the Missouri Pacific Railroad, and in connection with a committee of the

board of directors, to arrange with the Atlantic and Pacific Railroad an arbitration of all differences between said corporations.

"*Resolved*, That said committee consist of Messrs. Abraham Baylis, R. L. Cuttrey, Jr., W. H. Morrell, John R. Cecil and Jacob Cromwell."

Mr. Bowman then addressed the meeting in a lengthy speech, going over the history, etc., of the road, and replying to Mr. Baker and other speakers of yesterday.

At the conclusion of Mr. Bowman's remarks, Messrs. Cuttrey, Morrell & Cromwell declined to serve upon the committee proposed under Mr. George's resolution.

Mr. Baker then replied briefly to Mr. Bowman; President Hays also made a short address speaking as a stockholder of Missouri Pacific.

Mr. Bowman then offered the following resolution as a substitute for Mr. George's resolution still before the house, upon which he first demanded a vote by shares, and then moved the previous question, which latter motion was adopted.

(2.) "*Resolved*, That it is the wish of the stockholders of the Pacific Railroad of Missouri that separate receivers be appointed for this road, and that no person be selected as such receiver, who is a holder of Third Mortgage Bonds, or who is, in any manner interested in the Atlantic and Pacific Railroad Company, and that at as early a day as practicable the court be requested to order an election for a board of directors of the Pacific Railroad of Missouri."

The chair then appointed Messrs. Geo. H. Baine and F. A. Otis tellers to count the vote. A vote was then taken by

shares, after which the tellers reported to the chairman that 29,868 shares had voted "Yes" (or in favor of the resolution) and 6,351 "No" (or against the resolution).

Whereupon the chairman declared Mr. Bowman's resolution adopted by the meeting.

St. Louis County, through Mr. Bowman, offered to vote 4,038 shares of stock belonging to the County of St. Louis, "Yes", but it was rejected because not in the authorized list of stockholders used at the taking of the vote.

Mr Bowman then offered the following resolutions, which was also adopted by the meeting:

(3.) "*Resolved*: That the committee of stockholders of which N. A. Cowdry is chairman, be requested to confer with the committee now here from St. Louis, and select three suitable persons to suggest to the court for receivers of the Pacific Railroad of Missouri."

(4.) It was then moved and carried, that when this meeting adjourn, it adjourn to meet at the call of the secretary of this meeting.

(5.) It was then moved and carried, that the thanks of the meeting are due to Mayor Britton, of St. Louis, for the patient and impartial manner in which he has presided over this meeting

Meeting on motion then adjourned, subject to the call of the secretary.

FRANK. A. OTIS, Secretary.

CITY AND COUNTY OF NEW YORK } ss.

Frank A. Otis, being duly sworn, deposeth and saith,

that he resides in the City of New York, and that the foregoing certificates and the matters therein stated are true.

FRANK A. OTIS, Secretary.

Sworn to before me this 30th day of December, 1875.

WILLIAM P. O'CONNOR,
Notary Public, [53]
New York County.

[SEAL.]

COWDRY, vs. PACIFIC RAILROAD. } No. 704.

At an adjourned meeting of the stockholders of the Pacific Railroad Company, held at 25 William street, City of New York, November 5, 1875, the following resolutions were adopted, with but two dissenting voices, Clinton B. Fisk and T. T. Buckley:

"WHEREAS, The Atlantic and Pacific Railroad Company, lessee of the Missouri Pacific Railroad Company, has confessed, in open court, its inability to keep and perform its contracts and obligations, upon which confession the Circuit Court of the United States has placed said Atlantic and Pacific Railroad Company in the hands of receivers, as officers of the court; and,

WHEREAS, It is asserted, under oath, in proceedings instituted against this (the Missouri Pacific Railroad) Company by the County of St. Louis, that great irregularities exist on the part of the Atlantic and Pacific Railroad Company, in placing mortgage liens upon the railroad and property of the Missouri Pacific Railroad Company, by and through the instrumentality of the present directors of the Missouri Pacific Railroad Company; and,

WHEREAS, The present directors of the Missouri Pacific

Railroad Company are said to have a merely nominal interest in the railroad as stockholders, and by their action as directors, or by their neglect of prompt action, the result has been to place the Missouri Pacific Railroad Company in the hands of the Bankrupt Court for the Eastern District of Missouri, by this means and others, depreciating the real and also the market value of its capital stock far below its actual value, now, therefore,

"*Resolved*, That we, whose names are hereunto annexed, stockholders to the amount set opposite thereto, respectfully request each and all of the present directors of the Missouri Pacific Railroad Company to severally and successively resign the office of director of said company, and to select such stockholders as their successors in office as the committee hereinbelow named shall designate.

"*Resolved*, That the Atlantic and Pacific Railroad Company being in default in the payment of rent due to us, and confessing itself in open court unable to keep its contracts and obligations, the existing lease of our railroad to that company should be cancelled. And that the committee hereinafter appointed are hereby instructed to take all proper and reasonable steps for that purpose. To this end they are requested, if deemed by them best for our interest so to do, to join with the County of St. Louis in prosecuting the bankruptcy proceedings to the extent of getting an assignee of bankruptcy appointed, with instructions to procure an order of court cancelling said lease, or discharging its receiver from the custody and control of our railroad.

"*Resolved*, That Messrs. N. A. Cowdry, Jacob Cromwell, Peter Marie, A. W. Shepard, George R. Fearing, F. A. Otis and William H. Morell be, and they are hereby a committee on the part of the stockholders to carry these resolutions into effect."

At the meeting held November 4th, which adjourned to the 5th, Gen. Clinton B. Fisk placed the following names before the meeting, as being the present directors of the Missouri Pacific Railroad Company, and requested that the same might be published:

Names of the directors of the Missouri Pacific Railroad Company:

SAMUEL HAYS, President.

ANDREW PEIRCE.	M. J. LIPPMAN.
WM. H. COFFIN.	JAMES BAKER.
D. R. GARRISON.	JOHN TAUSSIG.
JAS. E. YATEMAN.	T. B. EDGAR.
E. O. STANARD.	OLIVER HART.
WEBB M. SAMUEL.	D. K. FERGUSON.

Attest, JENKINS VAN SCHAICK, Chairman.
WM. H. MORRELL, Secretary.

NAMES.	NO. OF SHARES.
Van Schaick & Co	1,000
Cowdry & Cross	1,000
A. W. Shepard	1,000
S. V. White	800
F. A. Otis & Co	2,200
Wm. H. Morrell	100
" " Agt	1,500
R. L. Cutting, Jr. & Co	2,000
David B. Van Emburgh	1,000
Campbell & Richmond	1,000
Van Dyck & Williams	300
Wm. C. Smith, Atty	1,100
Ed. Kraffmiller, Atty	500
J. Cromwell	700
" Agt	2,000
Ed. Goodwin	500
J. Marcus Boorman	500

Henry Hellebrandt	1,500
Baldwin & Weeks	700
Limbert & Co., Attys	200
Geo. R. Fearing	300
A. Lonsdale	200
F. M. Lockwood & Co	300
J. O. Wood	300
Peter Nugent	175
R. R. McIlvaine	200
D. B. Sichel	300
Leonard, Sheldon & Co	1,130
Wm. Drinkhouse	600
S. J. Drake	300
Nelson Robinson & Co	1,500
Wm. Turnbridge	1,100
Jackquelm & DeCoppett Bros	500
Sturtevant & Goodby	500
White, Morris & Con	800
S. M. Mills & Co	200
Wm. B. Beekman	400
J. T. Winchester	200
Wm. Heath & Co	300
Geo. W. Wright	300
Jas. Nies	100
Julius S. Theoband	200
Wm. H. J. Graham	10
Leland Bros	200
S. V. White, Trustee	700

New York.—ss.

On this 15th day of November, 1875, personally appeared N. A. Cowdry before the undersigned, a Clerk of the Circuit Court of the United States for the southern district of New York, and made oath that he is one of the firm of Cowdry & Cross, subscribers to the foregoing document of 1000 shares of the capital stock of the Pacific Railroad of

Missouri; that defendant owns said one thousand shares subscribed by his firm; that he is informed and verily believes that each of the other names signed thereto represent or own in their own right the number of shares set opposite to their respective names, amounting in the aggregate to 29,715 shares.

N. A. COWDRY.

Sworn to before me this 15th day of November, 1875.

KENNETH G. WHITE,

[SEAL.] Clerk of the Circuit Court of the U. S. for the Southern District of New York.

PACIFIC RAILROAD OF MISSOURI.

MINUTES OF

CONFERENCE MEETING

HELD AT

FIFTH AVE. HOTEL, EVE. OF DEC. 29TH, 1875.

F. A. O.

AND RESOLUTION OF STOCKHOLDERS' COMMITTEE AS TO RECEIVER, &c.

PACIFIC RAILROAD OF MISSOURI,

NEW YORK, DECEMBER 29th, 1875.

A conference meeting was held at the Fifth Avenue hotel between the stockholders' committee, New York, and the committee of gentlemen from St. Louis, the same gentlemen being present as on Monday, being December 27th, with the addition of Mr. Geo. R. Fearing, of the stockholders' committee. Mayor Britton in the chair, and F. A. Otis acting as secretary.

Mr. Bowman moved that the St Louis committee retire and decide upon the names to be suggested by them as Receivers of the Pacific Railroad, of Missouri, and that the New York committee decide upon names at same time to be suggested by them ; motion was seconded and carried.

Mr. Akers then offered the following resolution : "That the compensation of Receivers shall not exceed $5,000 a year apiece, and that the attorney be directed to have it made a part of the order of the court appointing them"—seconded and carried.

After separate consultation of the two committees, the St. Louis committee then named Col. Jos. L. Stephens and Judge Jas. T. Farrar to be suggested to the court as receivers, and the New York committee concurring, the names were unanimously adopted. The New York committee then decided to defer action on the third name, to be suggested by them, until further consultation.

Meeting then adjourned.

FRANK A. OTIS, Secretary.

N. Y., December 30th, 1875.

At a subsequent meeting of the stockholders' committee, held at 25 William street, at 3 o'clock P. M. this day, present : Messrs. N. A. Cowdry, Geo. R. Fearing, John T. Denny, F. A. Otis, Wm. H. Morrell, Peter Marie, and also Robt. L. Cutting, Jr., of the finance committee, the following resolution, offered by Mr. Marie, was unanimously adopted :

(1.) "WHEREAS, It is understood that the court is in favor of appointing three receivers, therefore :

"*Resolved*, That the stockholders' committee select Col.

Geo. E. Leighton, of St. Louis, as their nominee, and cordially assent to the selection of Col. Joseph L. Stephens, of Boonville, Mo., and Judge James T. Farrar, of St. Louis, the two nominees proposed by the County of St. Louis."

FRANK A. OTIS, Secretary.

CITY AND COUNTY OF NEW YORK, } ss.

Frank A. Otis, being duly sworn, deposeth and saith that, he resides in the City of New York, and that the foregoing certificates and matters therein stated, are true.

FRANK A. OTIS.

Sworn to before me, this 30th day of December, 1875.

WILLIAM P. O'CONNOR,
Notary Public,
New York County.

[SEAL.]

At a meeting of the stockholders of the Pacific Railroad Company of St Louis, the following resolutions were adopted by a stock vote of 29,868 in the affirmative and 6,351 in the negative:

1st. "*Resolved*, that it is the wish of the stockholders of the Pacific Railroad Company of Missouri, that separate receivers be appointed for this road, and that no person be selected as such receiver who is a holder of Third Mortgage Bonds, or who is in any manner interested in the Atlantic and Pacific Railroad Company, and that as early a day as practicable the court be requested to order an election for a board of directors of the Pacific Railroad of Missouri.

2d. "*Resolved*, that the committee of stockholders, of which N. A. Cowdry is chairman, be requested to confer

with the committee now here from St. Louis, and select three suitable persons to nominate to the court for receivers of the Pacific Railroad of Missouri."

The undersigned, stockholders of the Pacific Railroad Company of Missouri, approve and consent to the above recited resolution, and would have voted for them had they been present in the meeting when the vote was taken:

	SHARES.
S. V. White	900
White, Morris & Co	320
Sidney Wintringham	400
S. M. Mills & Co	200
A. C. Kingsland, by Geo. L. Kingsland, Attorney in fact	600
Geo. L. Kingsland	200
M. L. B. Martin	1,000

The following names are signed to it by authority of the accompanying proxies, which have come to hand since the meeting, by N. A. Cowdry and George R. Fearing:

	SHARES.
Eames & Moore	100
Vermilie & Co	100
Dominich & Dichgroom	100
Allen & Stead	300
Delafield & Fitch	100
Leland Brothers & Co	100
Total shares	4,620

N. A. COWDRY.

GEO. R. FEARING.

N. A. Cowdry,
vs.
Pacific Railroad *et al.* } 704

Suggestion of Cowdry and other Stockholders as to Person proper to be appointed as Receiver.

To the Honorable Samuel Treat, Judge of the Circuit Court of the United States for the Eastern District of Missouri:

The undersigned, as agent for stockholders who are real owners of more than half the stock of the Pacific Railroad, respectfully represents that in the event that a receiver shall be appointed by this Court, in the suit of Cowdry against the Pacific Railroad and others, that the stockholders whom he represents desire the appointment of John H. Beach or George E. Leighton as sole receiver, for the following reasons:

First. Because they believe that one efficient person would be more likely to successfully administer the affairs of the road than in the case of a number, who might have diverse opinions as to the general management of the road and the appointment of its officers, resulting very often in a compromise disastrous to the best interests of the company.

Second. Because the road, in the hands of either of these gentlemen, would be administered upon business principles, without ulterior personal or political ends to be subserved, or particular favorites to be put in office, but solely with a view to relieve the road from its embarrassments.

Third. Because, with the confidence that the stockholders feel in the management of either of the gentlemen whose

names are here presented of their property, there will be no difficulty whatever in obtaining from them such loans or credits as will be necessary for the transaction of its business, after the severance of the relations heretofore existing between the Atlantic and Pacific Railroad Company and the Pacific Railroad.

A. W. SHEPARD,
For N. A. COWDRY and other Stockholders.

PACIFIC RAILROAD OF MISSOURI.

MINUTES OF CONFERENCE MEETING

Held at Fifth Avenue Hotel, Evening of Dec. 27, 1875.

F. A. O.

PACIFIC RAILROAD OF MISSOURI.

NEW YORK, December 27, 1875.

A conference meeting was held at the Fifth Avenue Hotel between the following gentlemen interested in the Pacific Railroad of Missouri.

The meeting was called to order at 8 o'clock P. M. Present:

James H. Britton, Mayor of St. Louis; Chauncey F. Schultz, Presiding Justice St. Louis County Court; Hon. James S. Farrar, Judge St. Louis County Court; Hon. Joseph L. Stephens, of St. Louis; Hon. Thomas T. Akers, of St. Louis; Frank J. Bowman, Attorney for St. Louis County.

Stockholders' Committee: N. A. Cowdry, John T. Denny, Frank A. Otis, Peter Marie, William H. Morell, Robert L. Cutting, Jr., Chairman Finance Committee of above.

It was moved, seconded and unanimously carried, that Mayor Britton take the chair, and that Mr. Otis act as secretary of the meeting.

After some discussion as to the programme to be followed at the stockholders' meeting, to be held in New York on Tuesday, the 28th inst., it was moved, seconded and unanimously carried, that Mr. Cowdry be appointed to nominate Mr. Britton to take the chair at the stockholders' meeting on the 28th inst., and that Justice Schultz should nominate Mr. F. A. Otis to act as Secretary of the same meeting.

It was then moved, seconded and carried that the order of prodceding at said meeting, (on 28th inst.,) commence by Mr. Robert L. Cutting, Jr.'s offering the following resolution:

(1.) "*Resolved*, That the Chairman be requested to ask the directors of the Pacific Railroad, of Missouri, here present, to state whether they do severally pledge themselves to abide by such action as this meeting shall take after a full hearing, provided the same be expressed by a majority vote of the stock here represented."

The following resolution was then moved, seconded and unanimously carried:

(2.) "*Resolved*, That unless the holders of the Third Mortgage Bonds of the Missouri Pacific Railroad make to the stockholders a satisfactory proposition of settlement on or before January 15th, 1876. It is the wish of this meeting that the bankruptcy proceedings now pending, be prosecuted to a final termination for the purpose of obtaining an

equitable and proper adjustment of the Third Mortgage Bonds, provided the unsecured creditors pledge themselves to prosecute such proceedings for the purpose above named, and no further, and do further pledge themselves to vote to take the road out of bankruptcy so soon as such purpose is is accomplished, provided further, that this action be sanctioned by a formal vote of the St. Louis County Court pledging the county of St. Louis to N. A. Cowdry and other members of the stockholders' committee on its behalf, to so vote its claim, as to carry into effect the purposes contemplated in this resolution.

It was then moved, seconded and carried, that Mr. Peter Marie should offer the following resolution at the meeting on the 28th inst.

(3.) "*Resolved*, That each speaker be limited to fifteen minutes."

It was then moved, seconded and carried, that Mr. Cowdry use his best judgment as to the time and manner of offering the series of resolutions, as to arbitration and other matters, prepared by him, and read by him at this meeting.

It was then moved, seconded and carried, that it is the sense of this meeting that the present directors of the Pacific Railroad of Missouri should resign.

It was then moved and carried that it is the sense of this meeting that the representatives of the County of St. Louis present, have a right to vote at the stockholders meeting in accordance with the statute of the State of Missouri, to be found in *Wagner's Statutes, Section xxi.*

Meeting then adjourned.

FRANK A. OTIS, Sec'y.

City and County of New York } ss.

Frank A. Otis, being duly sworn, deposeth and saith, that he resides in the City of New York, and that the foregoing certificate and the matters therein stated, are true.

Frank A. Otis.

Sworn to, before me, this 30th Day of December, 1875.

[seal.] William P. O'Connor,
Notary Public,
New York County.

In court, Saturday, December 11th, 1875.

N. A. Cowdry,
vs.
The Pacific R. R., *et al.*

This day come the said parties, by their respective solicitors, and a motion for a provisional injunction herein against the defendants, not to transfer or dispose of certain bonds in said motion named, being submitted to the Hon. Samuel Treat, one of the judges of this court, at Chambers, and the matters and things therein being fully considered, it is ordered that the said defendants, to wit: The Pacific Railroad, the Atlantic and Pacific Railroad Company, Dwight Durkee, James Baker, Samuel Hays, M. J. Lippman, D. R. Garrison, John Taussig, Oliver Hart, D. K. Ferguson, T. B. Edgar, Rufus J. Lackland, Webb M. Samuel, Andrew Peirce and Thomas T. Buckley, and each and every of them, be and they are hereby enjoined and restrained from transferring and disposing of, or in anywise pledging, subjecting to sale, transfer or pledge, any of the Income or Improvement Bonds, or any of the five hundred thousand dollars ($500,000) bonds, for which Seligman & Bahn are trustees,

or any of the Third Mortgage Bonds, in the Bill of Complaint mentioned and set forth, until the further order of this court.

It is further ordered, that a temporary injunction, under seal of this court, be issued, upon the plaintiff filing an injunction bond, in the sum of twenty thousand dollars ($20,000), with sureties, to be approved by one of the judges of this court.

It is further ordered that the motion to discharge the receivers of the custody and control of the Pacific Railroad be, and the same is, hereby overruled.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MISSOURI. }

I, A. P. Selby, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be true copies of certain pleadings and proceedings in cases numbered 703 and 704, of George E. Ketchum against the Pacific Railroad *et al.*, and N. A. Cowdry against the Pacific Railroad *et al.*, as fully as the same remain on file and of record in said case in my office.

IN WITNESS WHEREOF, I hereunto subscribe my name and affix the seal of said court, at office in the City of St. Louis, in said District, this 26th day of November, in the year of our Lord, eighteen hundred and eighty-three.

[L. S.]

A. P. SELBY,
Clerk of said Court.

111-505

OFFICE SUPREME COURT U. S.
FILED
APR 14 1884
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

PACIFIC RAILROAD (OF MISSOURI),
Complainant and Appellant,

against

MISSOURI PACIFIC RAILWAY COMPANY ET AL.,
Defendants and Respondents.

No. 346.
OCTOBER TERM, 1883.

APPELLANT'S BRIEF.

N. A. COWDREY,
Of Counsel for Appellant.

C. G. Burgoyne, Law Printer, 57, 59 and 61 Park St., N. Y.

Supreme Court of the U. S.

PACIFIC RAILROAD (of Missouri), Complainant and Appellant, AGAINST MISSOURI PACIFIC RAILWAY COMPANY, CORNELIUS K. GARRISON and others, Defendants and Appellants.	No. 346. Oct. Term, 1883.

BRIEF OF APPELLANT.

Statement of Facts.

The matters involved in this appeal have been more or less before this Court on two former occasions.

Cutting, *ex parte*, 94 U. S., 14.
Railroad vs. Ketchum, 101 U. S., ~~99~~ 259

The bill of complainant of appellant was filed June 26th, 1880, against the Missouri Pacific Railway Company, C. K. Garrison, Jay Gould *et al.*

On the 26th day of September, 1880, the defendants The Missouri Pacific Railway Company, Oliver Garrison, D. R. Garrison, Webb M. Samuels and James Baker filed a demurrer to the bill of complaint; afterwards, on December 17th, 1880, the defendants George E. Ketchum, C.K. Garrison, Thomas W. Pierce and Joseph L. Stephens made a like demurrer.

The complaint averred:

FIRST. That the complainant and the railway company, one of the defendants, were corporations incorporated by or under the

laws of the State of Missouri. The citizenship of the corporations and of the other defendants (*folio 2*).

SECOND. That each of defendants had knowledge of the alleged frauds upon the complainant (*folio 3*).

That defendant Ketchum, on the 11th day of November, 1875, filed a bill of foreclosure against the property of the complainant, giving the names of the parties to said bills, and referring to a copy of the bill of complaint in that case which is made an exhibit in this case (*folio 4*).

FOURTH. That said Ketchum's foreclosure proceedings resulted in a decree of foreclosure and sale of complainant's property. Copies of the decree and Master's deed are attached as Exhibit B and B Continued (*folio 5*).

5th. That complainant, who was the chief defendant in the Ketchum suit, took an appeal to this Court from the order confirming said sale. That this Court could not hear said appeal until January, 1880, and was not able to give its opinion on the questions involved in said appeal until April, 1880, when this Court handed down its opinion that the appellant herein could not get redress on appeal, but that it must apply for relief in the Court where the fraud was perpetrated, and that the appellant *immediately* petitioned this Court to rehear said appeal; which petition was entertained, but not determined, by this Court until May 10th, 1880, when it was denied; whereupon this bill of complaint was filed June 26th, 1880 (folio 7).

6th. That the decree in the Ketchum suit was procured by false and fraudulent representations made by the defendants herein, in collusion and confederacy with themselves and others (folio 8).

7th. That said frauds were averred in the complaint to be:

1 *a*. That the Master's deed designedly and fraudulently embraced ~~were~~, other and different property of the appellant, than was embraced in the mortgaged deed being foreclosed, which additional property was described in the following words:

"Including, among other things, the track on Poplar street and the Levee, in the City of St. Louis, commonly known as the 'Poplar Street Track.'"

That said Poplar Street Track was never mortgaged to secure the payment of the bonds foreclosed, or was it in any manner embraced in that, or in any other mortgage. It was free and

unincumbered property of great value, worth more than the sum of $200,000 (folio 7).

The description of the premises sought to be foreclosed in the Ketchum suit, is found in the bill of complaint in that suit, which adopts and follows the language of the mortgage, and is as follows: "The line of the Pacific Railroad, extending *from* the depot at Seventh street, in the City of St. Louis, 283 miles, &c." (folio 105)

(The Poplar Street Track all lies easterly of Seventh street, between that street and the Mississippi River and several wharves and connecting railroads.)

The interpolation in the decree, of words not found either in the mortgage or in the bill of complaint, is as follows:

"Including, among other things, the track on Poplar street and the Levee, in the City of St. Louis, commonly known as the Poplar Street Track" (folio 132).

2 *a*. That said decree and deed of confirmation of sale embraced large blocks of other property, real and personal, not embraced in the mortgage, which has been fraudulently and wrongfully handed over to the purchasers at said sale, viz.: $750,000 of the bonds of the Atlantic & Pacific R. R. Co., known as equipment bonds (folio 8).

3 *a*. That large and valuable tracts of land in Kansas City, known as cattle yards, were acquired by the purchasers fraudulently under said decree of foreclosure (folio 8).

8th. The bill avers that the defendants fraudulently issued $4,000,000 of bonds, the same on which the Ketchum foreclosure suit was sustained (folios 11, 12, 13, 14, 15).

9th. That C. K. Garrison, on the 19th day of October, 1876, made oath that:

"He was one of the complainants in the (Ketchum) suit against the Pacific Railroad; and that he was the owner of over $1,500,000 of the bonds which he presented (to the Master); that the balance he was authorized to represent the owners of" (folio 17).

10th. That the pretended increase of the mortgage debt of the Pacific Railroad of $4,000,000 was fictitious, fraudulent, and

without consideration, and contrary to the laws of the State of Missouri (folios 18-19).

11th. That the appellant had no legal capacity to make said mortgage, and that the same was illegal, unauthorized and void (folios 21, 22, 23).

12th. That said bonds were never negotiated or sold, but some of them had been wrongfully used by the Atlantic & Pacific R. R. Co. as security in making loans for its use (folios 14-24, 25 and 26).

13th. That the appellant, for the reasons stated in the complaint, had a right to demand an account from the defendants Garrison and Sage (folio 22).

14th. That the defendant Garrison made a corrupt and wrongful agreement with—~~with~~ Andrew Pierce, James Baker and D. R. Garrison, to the injury of the appellant (folio 25).

16th. That the defendants James Baker and Andrew Pierce unlawfully confederated with the other defendants, or some of them, to wrongfully institute and prosecute the foreclosure suit of said Ketchum, to the great injury of the appellant (folios 29, 30).

17th. That the foreclosure proceedings in the Ketchum case were irregular, collusive and fraudulent for the foliowing and other reasons:

1 *a*. No replication was filed.

2 *a*. No reference to a Master was ever made to ascertain the amount of the debt.

3 *a*. The cause was hurriedly disposed of by the Court without waiting for the three months allowed by the rules in equity in which to put in an answer to the complaint.

4 *a*. No defense was made by the defendant, because of its improper conduct and collusion with Andrew Pierce and James Baker.

5 *a*. That the trustees, who alone had the right to foreclose the mortgage, never filed any cross-bill to the Ketchum suit or prayed for any relief.

6 *a*. That the recital in the decree that the cause was heard on "proofs" was false and fraudulent—there was no hearing whatever.

7*a*. That the decree as entered was collusive and fraudulent.

8 *a*. That it was false that Garrison, Pierce and Seligman were the owners of bonds, as recited in the decree.

9 *a*. That the decree did not find what debt was due or what sum of money was to be paid to prevent foreclosure. No interest was due upon the debt. The debt itself was not due.

10 *a*. No time was given for redemption of mortgaged premises.

11 *a*. That there was money enough in the hands of the Court at the time the decree was entered, and at the time the sale was made, to have paid all the debt there was due from the appellant.

12 *a*. That the whole amount of the $4,000,000 (third mortgage bonds) were not then issued.

13 *a*. That James Baker, the appellant's solicitor, became, in pursuance of a previous corrupt bargain, the purchaser of the appellant's property for the use of the defendants or some of them.

14 *a*. That one of the defendants here and complainant in the Ketchum suit—C. K. Garrison—became the surety of appellant's solicitor, Baker, as purchaser of the premises of appellant.

15 *a*. That Baker immediately transferred his interest as purchaser of said premises to a corporation formed by Garrison, one of the present defendants—The Missouri Pacific R. R. Co. (folios 32, 33, 34, 35, 36).

18th. That the new securities issued by the successor R. R. Company were to the holders of the said third mortgage bonds, viz.: C. K. Garrison, Russell Sage and James Seligman.

19th. That said Garrison, Sage and Seligman held nearly the entire amount of new bonds issued by the successor R. R. Co. in place of the old third mortgage bonds foreclosed (folios 38, 39).

20th. That the third mortgage so-called (the one foreclosed),—the decree of foreclosure,—the possession of appellant's property,—the mortgage made by the Missouri Pacific R. R. Co.,

Nov. 1st, 1876,—are each fraudulent and void and a cloud upon the title of the appellant, which it seeks by this bill to have removed (folios 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49).

21st. Appellant denies that it ever gave its consent to the entry of said decree; that the alleged consent of James Baker, its solicitor, was unauthorized and illegal (folio 53).

22d. That the defendants the Missouri Pacific R. R. Co., C. K. Garrison, Wm. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, Geo. J. Forrest, Webb M. Samuels and Joseph L. Stephens, are in the receipt of the income, earnings and receipts, derived from the appellant's railroad, with full knowledge of all of the frauds, and false and fraudulent practices, averred by the appellant as being practiced upon it by the defendants, and that they, individually and collectively, owe the appellant an account for said income, earnings and receipts—which account the appellant demands (folios 54, 55).

23d. That all the defendants, C, K. Garrison, his son and two brothers, Jay Gould, Sage *et al.*, and that each of them had knowledge of all the matters complained of, and were each of them parties to the averred frauds; and that Baker, the appellant's solicitor, was not authorized to consent to the decree entered; and that it was unlawful for him, said Baker, to buy appellant's property at a judicial sale, and that they could not rightfully pay him $20,000 or any other sum to change his allegiance and duty from appellant to defendants (folios 54, 55).

The Demurrers of Defendants.

Two demurrers were filed by the several defendants who have appeared.

1. The Missouri Pacific Railway Company, Oliver Garrison, D. R. Garrison, Webb M. Samuels and James Baker state as grounds of demurrer (folio 234):

I.

If a bill of review, it was not filed in time to review errors of record, and no leave of Court has been obtained to file bill of

review based upon errors not of record; and it does not appear that matters of complaint were not known to complainant at the time of foreclosure, and bill discloses laches (folio 235).

II.

Bill contains no description of property in reference to which suit is brought (folio 235).

III.

Bill fails to set forth the bill of complaint or decree in proceeding assailed (folio 236).

IV.

Bill shows laches on part of complainant, in absence of averment that complainant or its stockholders were ignorant of the frauds alleged, and by virtue of its appearing affirmatively that they were aware at all times of the facts charged as frauds (folio 236)?

V.

Bill shows that the stockholders of complaint, with full knowledge of the facts, waived opportunity to object, and assented to decree, and ratified the sale of the property thereunder (folio 237).

VI.

Bill fails to aver that stockholders were ignorant of facts complained of, existing prior to foreclosure, or that they could not defend (folio 237).

VII.

Bill is vague, inconsistent, &c. (folio 238).

VIII.

There is a defect of parties (folio 238).

IX.

Bill contains matter already adjudicated (folio 239).

X.

Oliver Garrison, D. R. Garrison and Webb M. Samuels not proper or necessary parties (folio 239).

George E. Ketchim, C. K. Garrison, Thomas W. Pierce and Joseph L. Stephens afterwards filed a separate demurrer, setting forth same grounds contained in the first nine grounds given above (folio 241 and 246).

XI.

The Court has no jurisdiction over this suit (folio 245).

Assignment of Errors.

FIRST. The Court erred in sustaining the demurrers, on the ground "that the bill did not state that the complainant had no knowledge of the facts constituting the fraud, and, in the exercise of due diligence, ought to have made them known to the Court pending the original suit;" because the appellant was a corporation, and right to relief is based not upon the fact of knowledge or no knowledge, but upon the fact that the corporation's functions and powers were usurped.

SECOND. The Court erred in sustaining the demurrers, on the ground "that it appeared by the bill that some of the stockholders had full knowledge of the matters sought to be set up as grounds of relief and discovery in the bill;" because the appellant was acting as a trustee for all the stockholders, and the knowledge of some of its *cestui que trusts* did not affect its rights or relieve it of its duty to protect the interests of all.

THIRD. The Court erred in sustaining the demurrers, on the ground "that the bill of complaint contained no description of the property in reference to which relief is sought;" because such description is contained in the exhibits attached to the bill.

FOURTH. The Court erred in sustaining the demurrers, on the ground "that the bill of complaint failed to set forth the bill of complaint or the decree in the preceding suit sought to be assailed;" because they were set forth as exhibits and attached to said bill.

FIFTH. The Court erred in sustaining the demurrers to the bill of complaint, on the ground "of laches on the part of the complainant;" because the bill shows no laches or explains sufficiently the delay in bringing the suit.

SIXTH. The court erred in sustaining the demurrers to the

bill of complaint, on the ground "that the said bill is vague, uncertain and inconsistent in its various averments;" because the averments and the relief sought all relate to one and the same transaction.

SEVENTH. The Court erred in sustaining the demurrers to the bill of complaint on the ground "that this Court has no jurisdiction over this suit;" because this suit, although by original bill, was a continuation and extension of a suit of which said Court had and has jurisdiction.

EIGHTH. The Circuit Court erred in sustaining the demurrers for any reason whatever.

Argument.

I.

A demurrer admits all facts that are well pleaded.

2d Swift's Digest, p. 240.
Mitford's Ey. Pl., p. 305 and cases there cited.
Bank vs. Buckner, 20 How, 125 (60 U. S. Rept.).
Rhode Island vs. Mass., 15 Peters, 270 (40 U. S. Rep.).
Sullivan vs. Mining Co., 109 U. S. Rep., 550.

This is the law of Missouri.

McKenzie vs. Mathews, 59 Mo., 103.

A demurrer to the whole bill will not be sustained if any part of the bill is good.

Livingston vs. Storey, 9 Peters, 632 (34 U. S. Rep.).

A demurrer may be held good in part and dismissed in part.

Hare vs. Mullen, 22 Wall., 42.

A general demurrer must be overruled if the pleading demurred to contain any good ground to support it. Per BRADLEY, Justice.

Buffington vs. Haney, 95 U. S. Rep., 99.

II.

The appellant avers in its complaint, and the defendants admit the truth of the averments:

1st. That the decree was procured by false and fraudulent representations (folio 6, &c.).

The defendants reply that is true, but what of it?

2d. That the decree fraudulently embraced a large amount of other property of the appellant, which was not covered by the mortgage foreclosed or by the complaint brought to foreclose the mortgage (folios 7, 8, 9).

Defendants say this is true. What of it?

3d. That the defendants by false and fraudulent representations caused a large apparent indebtedness to be made by the appellant, viz.: $4,000,000, which they secured by mortgage made July, 1875, and foreclosed November 11th, 1875, when there was at the very time money enough belonging to the appellant in the hands of the Court to pay all its indebtedness (folios 11 and 22).

Defendants say this is true. What of it?

4th. That said mortgage was made without legal authority or lawful capacity to make it, showing how and why (folios 22, 23).

Defendants say this is true. What of it?

5th. That the defendants Garrison and Sage owe the appellants on account; showing how and why (folio 26).

Defendants Garrison and Sage say this is true. What of it?

6th. That defendants C. K. Garrison, Andrew Pierce, James Baker and D. R. Garrison made a collusive and fraudulent agreement, to the injury of the appellant (folios 27, 28).

Defendants say this is true. What of it?

7th. That Baker, Garrison and Pierce confederated together

to wrongfully and fraudulently obtain appellant's railroad (folios 29 and 35).

Defendants say this is true. What of it?

8th. That the principal holders of the new securities are C. K. Garrison, Russell Sage, James Seligman and others of the defendants, who confederated together to wrongfully deprive appellant of its property (folios 37-38).

Defendants say this is true. What of it?

9th. That the mortgage made July 10th, 1875—the one foreclosed—the decree of foreclosure of said mortgage—the possession of appellant's railroad—the mortgage made by the defendant railroad company November 1, 1876—are each of them fraudulent and illegal; showing how and why (folios 39, 40).

Defendants say this is true. What of it?

10th. That the recitation in the decree that it was entered on consent is untrue; that the appellant never did consent to the decree or authorize any one to do so in its behalf (folio 53).

Defendants admit this to be true and say: What of it?

11th. That defendants, C. K. Garrison, Wm. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuels and Joseph L. Stephens and the Missouri Pacific R. R., have received large sums of money from the earnings of appellant's railroad with full knowledge of the frauds averred by appellant, for which sums of money they owe the appellant an account (folios 54 and 55). (Read folio 55.)

Defendants admit this to be true and say: What of it?

To all these averments of fraud, wrongful conversion of many millions of dollars worth of property, the defendants practically say, Yes, we have got the appellant's property, and we intend to keep it. The Courts are friendly to us, they sustain frivolous demurrers in our favor for reasons unknown to you.

~~A Circuit Judge cannot see the record before him, but can look a long way outside of it and find a "mares nest." We give Judges an addition to their salary, by giving them free travel nearly all over their circuit. We are strong and powerful.~~

Has not one of us on more than one occasion shown a doubting public his tin box containing a $100,000,000, more or less of securities; true $12,000,000 to $15,000,000 of this was wrongfully taken from the appellants, as shown in his complaint, which we admit to be true. You are weak and foolish, know nothing of human nature, to suppose you can succeed in Court against us. We have by the aid of a friendly Court and a frivolous demurrer compelled you to appeal at great expense, and have delayed you from proving your allegations, by admitting them to be true, for the time being. We are accused of making bargains with presidential nominees that on certain conditions we may name Judges of the highest Court. We do not deny it. We admit we have injured you, but the Court will give you no redress.

The Courts are friendly to us.

III.

The decree sought to be set aside by the appellant purports to be a *consent decree* (folio 140).

"The remedy for the fraud or unauthorized conduct of a solicitor or the officers of the corporation in such a matter (*i. e.*, a consent decree) is by an appropriate proceeding in the Court where the consent was received and acted on." MR. CHIEF JUSTICE WAITE.

Pacific R. R. vs. Ketchum, 101 U. S. Rep., ~~29~~. 289

The appellant seeks relief by its bill for "the fraud and unauthorized conduct of the solicitor and the officer of the corporation and defendants admit they have committed the frauds. Folios 27 and 36.

IV.

This suit is a continuation of and supplemental to the suit of *Ketchum vs. Pacific R. R. et al.*, so far as the parties to that suit

are concerned; and under the term parties is included all named as plaintiffs or defendants in that suit, and all who have come in under and pursuant to the decree, as purchasers, &c.

Dunn vs Clark, 8 Peters, 1.
Truman vs Howe, 24 How., 450.

As to other parties now first impleaded, it is an original suit.

Pacific R. R. vs. Missouri Pacific Ry. Co., 3 Fed. R., 772.—MILLER, Justice.

Such a bill is not technically known as a "Bill of Review," but as an "Original Bill."

Story's Eq. P., § 426: "Bills impeaching decrees for fraud." A bill of this sort is an original bill in the nature of a bill of review.

Mussill vs. Morgan, 3 Bro. Ch. R., 79.

"There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree when the same has been obtained by fraud and imposition, for these will defeat judgment at law and decrees of all suits, but they annul the whole in consideration of equity. This must be done by an original bill, and there is no instance of its being done by petition.

When a decree has been so obtained the Court will restore the parties to their former situation, whatever their rights may be. This bill may be filed without leave of the Court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue and being necessary to be established by proof before the proprietor of the decree can be investigated."

"When a decree has been obtained by consent, and the consent has been fraudulently obtained, the party aggrieved can only be relieved by original bill."

Story's Eq. Pl., Sec. 428.
Bradish vs. Gee, Ambl., 229.
Vose vs. Morton, 4 Cushing, 27.

In 2 Daniels' Chancery, p. 973, it is said:

"It may be mentioned with reference to the subject of consent causes that a decree or order made by consent of the counsel for the parties cannot be set aside either by rehearing or

appeal, or by bill of reviver, unless by clerical error anything has been inserted in the order as by consent to which the party had not consented, in which case a bill of review might lie. If, however, the decree has been obtained by fraud relief may be had against it by original bill."

Bradish vs. Gee, Amb., 229.
Harrison vs. Rumsey, *2 Ves. Sr.*, 488; Belt's Sup., 413.
Toder vs. Lamson, 7 Bro. Pa. C., Ed., Toml., 468, section 1120.
Cookes vs. Cookes, 1 W. N., 86.

V.

In such cases, although the proceeding is by *original bill*, the Court derives its jurisdiction from the fact that it had jurisdiction in the original suit, and it is necessary, in order to a proper administration of justice, to retain jurisdiction until all questions legitimately arising out of that suit are conclusively and finally settled.

Freeman vs. Howe, 24 How., U. S., 450.

VI.

There are two classes of frauds charged in the bill of complaint:

1. The first class relates to frauds in the matter on which the decree was rendered.

2. The second class relates to frauds extrinsic or collateral to the matter at issue in Ketchum vs. Pacific R. R.

This case comes within the exception to the rule, as stated in U. S. vs. Throckmorton, 98 U. S. R., p. 65.

Justice MILLER says:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the

issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, *a false promise of a compromise;* or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney, fradulently or without authority, assumes to represent a party and connives at his defeat; or where the attorney regulary employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, *and open the case for a new and a fair hearing.* (See Wells' *Res Adjudicata*, Sect. 499; Pearce vs. Olney, 20 Conn., 544; Wierich vs. DeZoya, 7 Ill., 385; Kent vs. Richards, 3 Md. Ch., 392; Smith vs. Lowry, 1 Johns. (N. Y.) Ch., 320; DeLouis *et al.* vs. Meek *et al.*, 2 Iowa, 55.) In all these cases, and many others which have been examined, relief has been granted, on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the Court."

In regard to both these classes of frauds the bill alleges:

That the consent of complainant's solicitor to the decree was purchased by a corrupt bargain made with Garrison, Pierce, &c. (Record, fols. 27, 28, 29 and 30).

1st. That the Poplar street track, not included in the mortgage, was surreptitiously and fraudulently put into the decree *without complainant's knowledge* (fol. 7).

2d. That complainant was controlled, and its organization and direction and use of its franchises and property was usurped by the directors of the Atlantic & Pacific R. R. Company from 1872 (fols. 10 and 59), and then shows that this collusive and corrupt condition lasted continuously until after the decree was entered (fols. 11 to 31).

VII.

The knowledge of the complainant with reference to these frauds was not a question in the case.

The complainant does not base its rights to relief on any theory of ignorance with regard to the first class of frauds complained of, but on the theory that it was imprisoned, bound, disabled from acting through the fraud of its officers, who could not be dislodged from their control of the company.

With regard to the second class of frauds, those extrinsic or collateral to the suit and its issues, the allegation is added that the additional property not covered by the mortgage was put into the decree without complainant's knowledge.

The bill does sufficiently state that this condition of foreign, hostile and fraudulent control existed through the suit and long after the decree was entered (fols. 10, 50).

While this company was in this condition, notice or diligence on the part of the corporation—in learning of the facts alleged in this complaint—was of no avail. The difficulty was deeper. It was a case of usurpation—of foreign control. The corporation was morally and physically deaf and blind and dumb—its official action was controlled by its adversaries.

VIII.

Laches.

The complainant has not been guilty of laches.

The bill shows that an appeal from the decree was promptly made by the complainant to determine the question of the Court's jurisdiction, and also to determine whether the record showed any authority in the solicitor to consent to a decree so unusual in its provisions, so regardless of all the rules of Court procedure and covering property not contained in the mortgage.

The appeal to this Court was determined in May, 1880, and the complaint in this case was filed June 26th, 1880.

This Court has judicially determined and announced to the world as a rule of law, in *Twin Lick Oil Company vs. Marbury*, U. S. Reports, per MILLER, Justice, "That the option to avoid such a sale must be exercised in a *reasonable* time. This has never been held to be any determined number of days or years as applied to every case, like the Statute of Limitations, but must be decided in each case upon all the elements of it, which affect that question." * * *

This Court has the power to determine what is a "*reasonable time.*" It has determined it in the following cases—in no case anything like the case now under consideration has the Court ever said that a less time than that fixed by the Statute of Limitations would bar the suit or make it so stale that a court of equity would not entertain it.

In Missouri, the Statute of Limitations is ten years. *Wagner's Statute*, vol. 2, page 915, section 1; Gen. Stat., chapter 171, and cases there cited.

Laches cannot be imputed until the expiration of ten years.

Hunter vs. Hunter, 50 Mo. Rep., 445.

The following cases show the judgment of the Court on the subject of laches.

Jenkins vs. Pye, 12 Peters, 254 (37 U. S. Rep.). This Court held that where the parties to a deed of real estate were dead, a writ could not be maintained after a lapse of eighteen years.

McKnight vs. Taylor, 1 How., 167 (42 U. S. Rep.), is a similar case to Jenkins vs. Pye, held that nineteen years barred suit.

In *Wagner vs. Baird*, 7 How, 259 (48 U. S. Rep.): This Court declared a post nuptial settlement stale after the lapse of over forty years from the time when it might have been enforced.

Platt vs. Vattier, 9 Peters, 416 (34 U. S. Rep.). This Court held that adverse possession for thirty years was a bar to a suit in equity.

Rhode Island vs. Massachusetts, 15 Peters, 270 (40 U. S. Rep.). This Court held that in political cases, ninety-two years did not bar the suit; that the laches might be excusable. This was an action concerning real estate; about three miles of the boundary line between two States was in controversy.

McLane vs. Fleming, 96 U. S. Rep., 245. This Court held that

after the lapse of twenty-five years a claim for the infringement of a trade-mark was stale.

Geddy vs. Kimmell, 99 U. S. Rep., 210. This Court held that a claim against a deceased trustee and alleged debtor could not be prosecuted after a lapse of fourteen years. The widow and children, the representatives of the deceased, living in Richmond, Virginia, and the suit having been commenced in Washington, D. C.

Burke vs. Smith, 16 Wall., 401. The Statute of Limitations governs courts of equity as to what constitutes laches, where the party had knowledge of the fraud.

Harwood vs. Railroad, 17 Wall., 78. Acquiescence in a judicial sale for 5 years bars a petition to set aside a sale for fraud.

Marsh vs. Whitteman, 21 Wall., 185 (88 U. S. Rep.). This Court held that an attorney who had sold bonds of his client who had acquiesced in the sale for twelve years could not be called to an account.

In *Broderic's Will*, 21 Wall., 503. Waiting 8 or 9 years before suit constituted laches.

Sullivan vs. Railroad, 94 U. S. Rep., 806. This Court held that a claim was stale which had not been enforced for seventeen years.

Wood vs. Carpenter, 101 U. S. Rep., 135 and 567. This Court held that claims which had lain dormant for twelve years were barred by lapse of time.

Hall vs. Law, 102 U. S. Rep., 461: That from 1832 to 1880—forty-eight years—made a claim for the partition of land stale and without merit.

Coddington vs. R. R., 103 U. S. Rep., 409. This Court held that eight years was a bar to a suit on past due coupons.

Upton vs. McLaughlin, 105 U. S. Rep., 645. This Court held that the Statute of Limitations in a bankruptcy case was a sufficient bar to the suit.

Landsale vs. Smith, 106 U. S. Rep., 371. This Court held that a claimant to real estate who had kept quiet from thirty to forty-five years was guilty of laches, and that the delay was unreasonable.

Badger vs. Badger, 2 Wall., 87. Quotes with approval the language of Lord Erskine.

"No length of time can prevent the unkeneling of a fraud."

"Delay will never purge a fraud while I sit here." Lord Northington. *Alden ve. Gregory*, 2 Eden., 285.

Prevost vs. Gratz, 6 Wheat., 481. Mr. Justice Story says: "In a case where fraud is imputed and proved" (in the case at bar it is admitted by defendants) "length of time ought not, on principle of eternal justice, to be admitted to repel relief. *On the contrary length of time aggrevates the offence.*"

The appellant avers in its complaint as an excuse for the delay in bringing its bill:

That it took an appeal to this Court at its first term after the rendition of the decree complained of on February 1st, 1877, that this Court could not hear it until January, 1880; and did not give its opinion until April, 1880; that the appellant immediately petition for a rehearing of the causes; that said petition was not disposed of by this Court until May 10th, 1880, and that the appellant at once, viz., June 26th, filed this bill of complaint (folio 6).

The defendants, admit the truth of this averment.

The appellant is advised that it might have truthfully averred, as an additional excuse for any apparent *laches*, that this Court was divided on the question decided in the Ketchum case, and that an equal number of its Justices thought that relief could and should have been granted in that suit, but that the Chief Justice differed with one-half of the Court and made the other half of it; hence the appellant was in that case denied relief for the injuries sustained.

Wherefore it humbly submits that it ought not to be further punished for *laches* when one-half of this high Court concurred with the appellant in its mistaken views as to what remedy to prosecute.

The Circuit Court attempts to show laches on the part of the appellant, by reiterating the false return of the Judges to the writ of mandamus, *ex parte* Cutting, 94 U. S. Rep., 22, in this; that "said Cowdrey and all other stockholders who might join with him, were in Court during all proceedings of the term when the decree of foreclosure and sale was entered, and had the fullest opportunity to intervene by joining in the answers and cross-bills filed by Akers and said St. Louis County, and otherwise."

It is not true in fact that said Cowdrey and all or any other stockholders, known to him, were present in Court at the time

named, or within 1,000 miles of said Court. This false return is in every stage of this litigation reiterated; much too often to be accidental or mistakenly repeated. Cowdrey has always, and now does, pronounce it false, and believes it to have been an imposition upon the Judges of the Circuit Court.

The reason of non-intervention of the stockholders in the Aker's cross-bill was fully set forth in briefs in the Ketchum case when argued before this Court. They were in short because the Aker's intervention was not in good faith; it was an imposition upon the Court. Akers was not a stockholder or the representative of one, which fact was known to Cowdrey *et al.* He was a tool of Garrison. As to the County of St. Louis, it is and was doubtful whether it was an owner of stock; it had a claim subsequently adjudicated by this Court, *Ketchum vs. St. Louis*, 101 U. S. *Rep.*, 306, and its claims at the time it had agreed with Garrison to settle. (See Garrison's letter, shown to this Court as an exhibit in the Ketchum case, 101 U. S. Rep., p. 26, averred at folio 47.)

The stockholders tried in every way known to them to become parties to the litigation, but the Circuit Court arbitrarily, tyrannically and cruelly refused to let them in, and this Court said it was a question of discretion for the Circuit Court, and it would not interfere with this abuse of discretion.

Ex parte Cutting, 94 U. S. Rep., p. 22.

It is a mockery of justice on the part of the Circuit Court to refuse to let the stockholders defend the Ketchum suit—to call Akers, one of their number—and then to taunt them for not becoming parties and defending the suit.

See McCrary, J., opinion, p. 5.

The Circuit Court seeks to fortify its extraordinary opinion by quoting Mr. Justice MILLER in 3d Fed. Rep., *Wetmore vs. Railroad*, and to do so, perhaps unintentionally, misquotes the case. The Circuit Court quotes *Wetmore vs. Railroad*, and say it "was a bill by *stockholders* to set aside a sale, and the decree of foreclosure upon facts somewhat similar to those presented by the present bill."

Now, the case itself says that Wetmore and other *bondholders*, representing $1,500,000 out of an issue of $15,000,000, came into Court *by petition one year after the sale*, and asked to

have the sale set aside, although the decree had been entered, and the sale made with the consent and at the request of the trustee of the bondholders. Mr. Justice MILLER says that the dissatisfied bondholders had five years during the litigation to have become parties to the suit; they waited until one year after the sale, and then expressed their dissatisfaction by petition in the original suit.

The Circuit Court could not see the great and fundamental distinction between the two cases.

This intelligent Court will not have the same difficulty.

The Circuit Court could not see the plain averments in the complaint, and probably did not consider that the demurrer admitted each and every averment to be true; but in its anxiety to look beyond all question before it, it could see, not from the bill, for there was nothing therein contained about it; not from the proofs, for all questions were of law, no proofs were taken or before the Court; that Cowdrey *et al.* was present in Court when the decree was entered, when, as a matter of fact, he was not within a thousand miles of the Court; that "the managing committee (of stockholders) to whom they intrusted their interest, afterwards became satisfied with, and assented to the decree." Through what back-door influence such information, wholly foreign to the averments and admitted facts of the complaint, such extraneous information was derived, your orator knows not, and he calls the attention of this Court to the necessity of supervising the discretion exercised by inferior Courts that exercise such great powers and have such peculiar visions.

IX.

The objection of laches taken by demurrer is only good when the bill shows that some statute of limitations is applicable; for if no statute bars the complaint, so that he is not entitled to relief, is an inference from facts and to a great extent a matter of discretion, which can only be determined when the facts are be-

fore the Court. The plaintiff cannot be required to encumber the bill by setting forth every equitable circumstance which may tend to excuse any apparent delay in bringing a suit.

Dan. Ch., Pl. & Pr., Vol. 1, pp. 559, 560; 1 Mad. Ch., 139

X.

The bill does show that at the earliest practicable moment the complainant proceeded to assert its rights.

1st. By appealing from the decree in order to determine the question as to whether the United States Courts had jurisdiction of the suit. This was the fundamental inquiry, and its determination was preliminary to all other inquiries, and it was essential that it should be determined by the Court of lost resort, as that only could settle it. It was also proper to determine by appeal whether the consent decree had not exceeded (in the property it covered —that is, in including the Poplar street track—and in going beyond what the facts of the case as exhibited in the pleadings warrranted) the bounds by and within which an attorney must and could act when consenting to forfeit the rights of his client.

2d. By bringing this bill immediately upon the decision of these preliminary and fundamental questions.

XI.

The bill does not show that the stockholders of the complainant, *as a body*, knew of these frauds, or were advised of the foreclosure, and took action looking to its defense.

It does say that "the stockholders, at the annual meeting of March 27, 1876, requested the directors to employ counsel other than James Baker to protect the corporation" (fol. 44).

And "that the directors refused, on demand of holders of 10,000 shares, to make a motion to set aside the decree" (fol. 43).

And "the stockholders in writing requested said directors" to resign, &c. (fol. 51).

There is absolutely nothing in any of these allegation to charge these stockholders with knowledge or notice of the long array of frauds alleged in this bill of complaint.

Many of them, such as the consent decree, and its fraudulent provisions, occurred after the annual meeting of March 27, 1876.

The decree was June 6, 1876 (fol. 129).

In other cases the bill shows either that only a small portion of the stockholders acted (fol. 43) or no time is stated or number given.

To forfeit the rights of the corporation representing as a trustee the whole body of shareholders in this company, and its property upon such indefinite allegations of notice and knowledge, on the part of a portion of the stockholders, would be the height of injustice, and no court of equity should bind itself to any such result.

XII.

The fact that the bill shows that certain of the stockholders of the complainant company knew of these frauds at the time the original suit was pending, and failed to act in defense for the corporation, does not forfeit the rights of the corporation acting as the trustee for all the shareholders.

1. Individual stockholders in a great corporation like this should not have their rights cut off because they failed to defend in behalf of a delinquent trustee who represented them and others. It is a momentous task for individuals to undertake the burden and expense of a great corporation litigation like the one under consideration. Few men

singly or aggregated have the means at their command to carry out such a fight. The stockholder has no standing in such a suit except by permission of the Court. If to this we add a penalty that because certain stockholders had an opportunity to defend and failed to do so, others who were not notified of the facts and relied upon their trustee—the corporation—to protect them, as they had a perfect right to do, are cut off, a new rule of adjudicating upon the rights of individuals and their trustee is introduced. The rule heretofore has been that each individual was entitled to his day in court, and you could not adjudge his rights until he had been heard; now it is proposed to forfeit his rights because others in like interest failed to assert them.

2. Admitting the charges of the bill as to the derelict conduct of the corporation in the hands of the conspirators, no action of, or want of action, by a portion of the shareholders could bind or forfeit the rights of the others who had not participated in such action, or known of such want of action, nor upon such a state of facts should a court of equity decline to hear a trustee—corporation—which has recovered its power of speech and right of action when it asserts the wrongfully forfeited rights of its *cestuix que trusts* against the conspirators who were responsible for all its derelictions and their privies in interest with full knowledge of all the facts. (Be it remembered, that this bill alleges that the Missouri Pacific Railway was entirely made up stockholders and bondholders—at the time this suit was brought of the parties who concocted and carried to its consummation the fraud upon the complainant, fols. 52 and 53).

3. The stockholders do not represent the corporation, and their action or non-action ought not to bind the corporation.

Chief Justice WAITE in *ex parte* Cutting, 94 U. S. R., 22: "The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit for the purpose of protecting *their own* interests in the corporation against unfounded and illegal claims against it, but 'this remedy is an extreme one and should be admitted by

the Court with hesitation and caution.' (Bronson vs. La Crosse R. R. Co., 2 Wall., 202.) It is always addressed to the sound discretion of the Court."

XIII.

We submit that the bill should be sustained and the decree of the Circuit Court overruling the demurrer reversed. The case remanded to the Circuit Court with direction to refer it to a Master to state the account, ascertain the damages, and to enter judgment for the amount so ascertained.

N. A. COWDREY,
Of Counsel for Complainant.

111-505

FILED
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883. No. 346.

THE PACIFIC RAILROAD COMPANY OF MISSOURI,
Appellant,

against

THE MISSOURI PACIFIC RAILWAY COMPANY, CORNELIUS K. GARRISON ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANT.

D. H. CHAMBERLAIN,
WM. B. HORNBLOWER,
For Appellant.

C. G. BURGOYNE, Printer, 57, 59 & 61 Park Street (Five Points), N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 346.

THE PACIFIC RAILROAD COMPANY OF MISSOURI,
Appellant,

AGAINST

THE MISSOURI PACIFIC RAILWAY COMPANY, CORNELIUS K. GARRISON ET. AL.,
Respondents.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF FOR APPELLANT.

Statement.

On June 26th, 1881, the appellant, the Pacific Railroad Company of Missouri, filed its bill of complaint in equity in the Clerk's office of the Circuit Court of the United States for the Eastern District of Missouri against the Missouri Pacific Railway Company and others.

I. By this bill the appellant avers the corporate existence and citizenship of the appellant and respondent railroad companies, and the citizenship of the other defendants, corporate and individual.

II. That each of the defendants were parties to certain frauds and misconduct complained of in subsequent parts of the bill.

III. That one Ketchum filed his bill against the appellant and others named, November 11, 1875, a copy of which complaint is annexed, and leave asked to refer to the same with the same effect, as if fully set out in the bill, &c. (*Record, p. 2, fol. 4*). That certain other persons were thereafter made complainants with Ketchum, whose solicitors were instructed to receive their instructions from one James Baker, who was then the solicitor of the appellant, which they did.

IV. That thereafter a decree of foreclosure and sale was passed in said Court upon said bill June 6, 1876, said sale being made and confirmed October 6, 1876, copies of said decrees, &c., being annexed and made part of the bill (Record, p. 2, fol. 5).

V. That appellant appealed from said decree, February 1, 1877, to this Court, at the first term of said Circuit Court held after the making of said decree; that said appeal was decided by this Court in April, 1880; that the appellant petitioned for a rehearing of said appeal by this Court, which was denied in May, 1880, and thereupon the appellant filed his bill in this suit.

VI. That said decree of foreclosure and sale was procured by the false and fraudulent representations of the defendants in collusion with each other and with others, said frauds being, in particular, that the said decree and Master's deed fraudulently covered more, other and different property than was covered by the mortgage, said property being then specifically described.

VII. That the Atlantic & Pacific Railroad Company was the lessee of the appellant's railroad, under a lease which appellant asks leave to refer to as if made part of the bill, and was in possession of the property of appellant; and that by the terms of said lease the Atlantic & Pacific Railroad Company assumed certain obligation, including the payment of rental, to the appellant, which being unable to pay, its managers sought to evade its obligation by destroying the appellant.

VIII. That on and before June, 1872, the chief officers and directors of the Atlantic & Pacific Railroad Company, Pierce, Seligman and Stout, with others unknown, procured the ownership of a majority of appellants' stock for the avowed purpose of procuring control of all its assets and road; and that in execution of such purpose, said directors and officers procured the execution of a lease between the two roads, said lease being made an exhibit to this bill; that upon the execution of said lease, the Atlantic and Pacific Railroad Company became possessed of all the property and franchises of the appellant, and at all times since, the appelant has not been in control of appellant's road and property, except to receive rents under said lease from June, 1872, to July, 1875.

IX. That since the making of said lease the stockholders of the appellant have been paid all dues under said lease to July, 1875; that all interest on its bonds were also paid, and that the appellant was not in default on any mortgage liability which existed when said lease was made.

X. That during said lease the A. & P. R. R. Company, by false and fraudulent representations that the appellant was indebted to the A. & P. R. R. Company, for improvements made on appellant's property, procured the execution by appellant of three issues of bonds, namely: Income bonds for $1,500,000; Improvement bonds for $2,000,000; Third Mortgage bonds, so-called, for $4,000,000. That the proceeds of all said issues of bonds went to the A. & P. R. R. Company and its directors and managers, by whose false and fraudulent action their isssue was procured.

XI. That at or before November 11, 1875, the A. & P. R. R. Company was indebted to various persons and corporations, whose names are set forth.

That C. K. Garrison, on examination in the said suit of Ketchum, said that he was one of the complainants therein, the owner of over $1,500,000 of said third mortgage bonds, and represented the owners of the rest.

XII. That by the terms of said lease the A. & P. R. R. Co. undertook to pay all debts of the appellant, as well as all oper-

ating and repairing expenses, and all interest on bonds to be issued after the date of said lease for extending its lines, buying rolling stocks, and rentals.

XIII. That the pretended increase of mortgage debt of $4,000,000 between July, 1872, and July, 1875, is fictitious, fraudulent, and without consideration, and contrary to the laws of Missouri; that the net income of the appellant from the date of lease to December 31, 1874, was $739,172.68.

XIV. That the recitals in said third mortgage bonds were false, and that no additional rolling stock had been procured by the lessee.

XV. That the appellant had no legal capacity to execute said third mortgage or issue said bonds, and that the laws of Missouri only authorized mortgages of railroad property for certain stated purposes, and that no issue is valid without the vote of the stockholders.

XVI. That the only pretended authority for this issue is shown by a circular and form of proxy of Mr. Hayes, President, of which a copy is attached to the bill; that said circular and proxy do not authorize the mortgage of $4,000,000 or any amount whatever.

XVII. That the A. & P. R. R. Co. did not negotiate absolutely any of said "improvement" bonds, but used them to aid its own credit, and that several of its directors and officers were endorsers in obligations of the company secured by said bonds; that said third mortgage were procured to be executed fraudulently to be used as additional security for said loans endorsed by said directors and officers, and that $2,500,000 of said third mortgage bonds were used in payment of obligations of the A. & P. R. R. Co, and that defendants Garrison, Sage and Seligman, with full knowledge of these facts, bought at heavy discount the past-due obligations of the A. & P. R. R. Co., together with the said third mortgage bonds as collaterals; and that some of the officers of the appellant were likewise interested in said past-due paper, and hence

pushed on the said foreclosure to the injury of the appellant.

XVIII. That defendants Stout, Fish, Daniel R. Garrison, Samuels, W. R. Garrison and C. K. Garrison were during all these transactions and to the commencement of the foreclosure suit, either directors of the A. & P. R. R. Co., or of the appellant, or creditors, or otherwise benefited by said frauds and fully cognizant of all said fraudulent acts and are not holders in good faith of said third mortgage bonds.

XIX. That defendant C. K. Garrison agreed with Pierce, Baker and D. R. Garrison that if they would consent to a decree in the suit of Ketchum, he would pay all their liabilities in connection with the A. & P. R. R. Co., and that pursuant to such agreement said Garrison did pay said liabilities and took said income and improvement bonds which were held as collaterals, and thereupon said Pierce, Baker and D. R. Garrison fraudulently consented to procure said decree and foreclosure of appellant's property.

XX. That prior and subsequent to November 1, 1875, James Baker, one of the directors of the appellant and its general attorney, with one Pierce, another director, and others unknown, confederated with some of the defendants herein to institute foreclosure proceedings under the said third mortgage of appellant, in order to obtain the entire property for themselves for greatly less than its real value, and in execution of this scheme procured the bill of foreclosure to be printed prior to November 1, 1875, and filed it in the Circuit Court for the Eastern District of Missouri, and procured complainant, Ketchum, to allow his name to be used therein, and that said bill was sworn to before November 1, and before any coupons were in default; and without waiting six months, or procuring the request of bondholders, as required by the deed of trust, they began suit, Baker admitting service in the name of the appellant without authority, and filing answer of appellant, falsely admitting the due and lawful execution of said mortgage, well knowing such admission to be false and fraudulent.

XXI. That said Baker, in pursuance of said conspiracy, pur-

chased the property at said sale, not for the appellant, his clients; and that he received a pecuniary reward from the defendant, the Missouri Pacific Railway, for doing the same; that Baker bought the property upon secret agreement and in trust for C. K. Garrison and his associates for $3,000,000, payable in third mortgage bonds, a sum greatly less than the real value; that C. K. Garrison was surety for Baker as purchaser; that Baker transferred his interest in the purchase to the defendant, the Missouri Pacific Railway Company, who have since held it.

XXII. That the said Missouri Pacific Railway Company has issued to the holders of the third mortgage bonds of the appellant, bonds of itself for an equivalent amount, said third mortgage bondholders receiving accrued interest in cash, and purchasing an equal amount of the stock of the said Missouri Pacific Railway Company; that the principal holders of said third mortgage bonds are and were C. K. Garrison, Sage and Seligman and others, who were confederated to procure said decree of sale.

XXIII. That November 1, 1876, the said Missouri Pacific Railway made a mortgage for $4,500,000 to secure a pretended and fraudulent indebtedness. That the defendants, the Missouri Pacific, C. K. Garrison, Sage and Seligman, hold and own or the same are held for their use, nearly the whole amount of the said third mortgage bonds, all of whom took them with full knowledge of the fraud and want of authority in their issue.

XXIV. That as part of said fraudulent scheme, the Atlantic and Pacific Railroad Company procured the passage of an Act of the Legislature, to enable the directors of appellant to retain control of the company against the will of the stockholders; that from the passage of said act to December, 1876, the A. & P. R. R. Co., through the directors of the appellant who were false to their trust, have controlled the appellant and its property; that appellant's directors did not properly represent appellant or its stockholders, but used their position to injure the property of appellant.

XXV. That appellant's stockholders requested said directors to employ other counsel than James Baker to defend the

Ketchum suit, but that said directors allowed Baker, who had caused the Ketchum complaint to be prepared before any cause of action arose, and had caused the subpœna to be served on himself, to put in the answer of appellant in said suit, when said directors and said Baker well knew that said answer was false and fraudulent.

XXVI. That the defendants, C. K. Garrison, W. R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuels and Joseph L. Stephens, with others unknown, are now, and have been, directors of the defendant, the Missouri Pacific R. R. Company, and in the receipt of its income and in possession of its property, and have been since October, 1876, to the present time, by means of the false and fraudulent conspiracy and acts hereinbefore set forth, and with full knowledge thereof.

The bill concludes with interrogatories to be answered on oath by the defendants, and a verification by Peter Marié, Vice-President.

To this bill of complaint the defendants, the Missouri Pacific Railway Company, Oliver Garrison, Webb M. Samuels and James Baker, on the 20th September, 1880, filed a demurrer setting up a variety of specific grounds of demurrer, of which those relied on are presumably discussed in the brief of counsel for appellees, and need not be set forth at length here.

December 17, 1880, Ketchum and other defendants filed their demurrer to the bill, the specific grounds of which appear to be the same as in the former demurrer, with the additional ground that "the Court has no jurisdiction over this suit."

March 31 and April 18, 1881, the Circuit Court made orders sustaining the demurrers, and thereupon the appellant took this appeal.

The opinion of the Circuit Judge appears at page 93 of the record.

Assignment of Errors.

The appellant assigns for error in said judgment of the Circuit Court:

(1) That said Circuit Court erred in sustaining the demurrers on the ground of the insufficiency of the bill in respect to averments of complainants' want of knowledge or notice of the facts constituting the alleged fraud, or that complainant could not by proper diligence have learned said facts.

(2) That said Court erred in sustaining the demurrer on the ground that the stockholders had knowledge and notice of said alleged frauds, and that such knowledge or notice binds and concludes the appellant corporation.

(3) That said Court erred in sustaining the demurrer on the ground that the stockholders were bound by the proceedings of a stockholders' meeting, or were bound, as against the frauds of the defendants, or the collusive action of appellant's officers, by the action of any stockholders' committee, or by the fact that other stockholders, more or less, actually appeared and were admitted as parties to the suit, and that such facts, if proved, respecting stockholders, bound the corporation.

(4) That said Circuit Court erred in considering any matter outside the record in this case, or in admitting or considering for any purpose on these demurrers any matters not embraced by the bill of complaint.

(5) That said Circuit Court erred in not overruling and dismissing the demurrers.

I.

Jurisdiction.

The question of the jurisdiction of the Circuit Court was raised by one of the specific grounds of one of the demurrers of the defendants, but was not passed upon by the Court, though referred to in the Court's opinion as "an important question," but not necessary to be decided.

As this ground is relied upon and is open in this Court, it is necessary to consider it, and it is naturally the first point to be examined.

The objection to the jurisdiction of the Court is not well taken.

It is well settled by the decisions of this Court that a suit may be maintained in the Federal Court, which is supplementary to and ancillary to a suit of which that Court had jurisdiction, notwithstanding the citizenship of the parties is such that the Court would not ordinarily have jurisdiction of the suit if it were an entirely independent proceeding.

Thus, in *Logan vs. Patrick, 5 Cranch, 288*, it was held that the Circuit Court has jurisdiction of a suit in equity to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant out of the district in which the Court sits.

The same principle was held in *Dunn vs. Clarke, 8 Peters, 1*, and in *Clarke vs. Mathewson, 12 Peters, 164*. In the latter case it was held that the U. S. Court could entertain a bill of revivor by an administrator, notwithstanding he was a citizen of the same State as the defendant, the Court having acquired jurisdiction of the parties in the original suit.

So in *Freeman vs. Howe, 24 How., 450*, NELSON, J., says: "The principle is that a bill filed on the equity side of the Court to restrain or regulate judgments or suits at law in the same Court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, *and is maintained without reference to the citizenship or residence of the parties.* The case in *8 Peters, 1*, which was among the first that came before the Court, deserves perhaps a word of explanation. It would seem from a remark in the opinion that the power of the Court was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law."

See also

Minnesota R. R. Co. vs. St. Paul R. R. Co., 2 Wall., 609.
Jones vs. Andrews, 10 Wal., 327.
St. Luke's Hospital vs. Barclay, 3 Blatch., 259.
Stone vs. Bishop, 4 Cliff., 593.
Dunlap vs. Stetson, 4 Mason, 349.
Conwell vs. Canal Co., 4 Biss., 195.

All of which cases illustrate various phases of the question, and furnish various precedents as to suits brought to set aside or to enforce or construe judgments of the U. S. Circuit Court.

The cases cited by counsel for the respondent are not at variance with these cases. Thus

Sahlgard vs Kennedy, 2 Fed. Rep., 295,

cited by counsel for the respondent, held that an original suit may be maintained to set aside the decree of another Court as fraudulent, where there are parties other than those which were before the other Court. But this case does not hold that such a suit could not also be maintained in the Court where the decree was rendered, as supplementary to that decree. So

Barrow vs Hunton, 99 U. S., 82,

cited by the counsel for the respondents, held that a proceeding begun in the State Court to set aside a judgment of the Court as void, as having been obtained by default and without lawful service of process, could not be removed into the U. S. Circuit Court on the ground of the citizenship of the parties. This Court held that the proceeding by petition in the State Court was substantially a continuation of the original suit. Mr. Justice BRADLEY, in his opinion, draws a distinction between a proceeding to set aside a judgment in the Court in which it was rendered, on the ground of irregularity, which proceeding, he holds, is merely a continuation of the original suit, and is not removable into the U. S. Court, and an original suit to set aside a decree for fraud in the obtaining thereof. But Mr. Justice BRADLEY did not hold, and was not called upon to hold, that the U. S. Court could not maintain a suit in equity to set aside its own judgment on the ground of fraud, without regard to citizenship. He merely held that the citizenship of the parties does not of itself give the U. S. Courts jurisdiction of a proceeding to set aside the judgment of a State Court in cases where an independent bill in equity would not lie for that purpose.

The fact that Mr. Justice BRADLEY defines a bill to set aside a decree for fraud as an *original bill* does not militate against the position we have taken in this case—that the suit is ancillary to the former one. The language of Mr. Justice MILLER in the

case of the *Minnesota R. R. Co. vs. St. Paul R. R. Co.*, 2 Wall., 633, is conclusive on this point. Mr. Justice MILLER held in that case that where a bill in equity is necessary to have a construction of the orders, decrees and acts of a Federal Court, the bill is properly filed in such Court notwithstanding parties are interested in such construction who would not, from want of proper citizenship, be within the jurisdiction of the Court; that in such a case the question is not whether the bill is *supplemental* or *original* in the technical sense of equity pleading, but whether it is to be considered as supplementary or entirely new and original in that sense which the Supreme Court has sanctioned with reference to the line which divides the jurisdiction of Federal Courts from that of the State Courts.

"No one, for instance, would hesitate to say, that according to the English Chancery Practice a bill to enjoin a judgment at law is an original bill in the Chancery sense of the word; yet this Court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that Court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the Court will proceed in the injunction suit without actual service of the subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law."

Mr. Justice MILLER also held, that purchasers at a foreclosure sale, subjected themselves, *quoad hoc*, to the jurisdiction of the Court, citing *Blossom vs. Milwaukee & Chicago R. R. Co.*, 1 Wall., 635.

There would seem to be no room for question, under these authorities, that this bill, which is brought for the express purpose of setting aside a judgment of the U. S. Circuit Court of the Eastern District of Missouri, is properly brought in that Court.

II.

The authorities cited by counsel for respondent as holding that an original bill to set aside a decree on the ground of fraud must be limited to the same time as for instituting a bill of review, or for taking an appeal, are not in point. Indeed, counsel themselves concede, that special circumstances will take a case out of such a rule, even if such a rule is ever to be applied.

Story's Eq. Pl., § 419, relates entirely and in express terms to bills of review, and not to original bills to set aside a decree for fraud.

Evans vs. Bacon, 99 Mass., 213, merely holds that while there is no statute limitation fixing a precise period of time within which such a bill must be filed; yet the limitation for writs of review "affords a close and forcible analogy," where "no reason is assigned and no excuse is offered for a greater delay;" but the Court expressly declines to lay down "any inflexible rule" (see p. 215). In that case the decree was made in April, 1862. In October, 1864, a petition to set it aside was heard and denied. Plaintiff then waited till February 27th, 1867, before filing his bill to set the decree aside, and this was held to be an unreasonable delay.

In *Plymouth vs. Russell Mills*, 7 Allen, 438, it was only *held* that an "*unexplained delay* of more than four years after the discovery of new and material evidence, is such laches as will defeat a bill to set aside an award."

Thomas vs. Brockenborough, 10 Wheat., 146, deals with bills of review exclusively; and holds that where a bill of review is founded upon errors appearing *on the face of the record*, they should be limited to the same period as that allowed by statute for an appeal, because the two remedies are alternative remedies to accomplish the same object, and a party complaining of the original decree should not be permitted in this way to do indirectly what Congress has prohibited him to do directly (see opinion of Washington, J., p. 151). But whether a bill of review, founded upon newly discovered evidence, should be likewise barred by the same period, the Court declines to decide (p. 151); and *a fortiori* it declined to decide that an original bill to set aside a decree for fraud should be so barred.

All the authorities cited by counsel for the respondent, and indeed all the authorities on the subject, admit that a bill of review founded upon matters *outside the record* is *not* limited by the time prescribed by statute for appealing.

See *Ricker vs. Powell*, 100 U. S., 109.

It follows, that an original bill to set aside a decree upon allegations of fraud will not be so limited.

The question whether this bill was filed in time is therefore to be determined on general equitable principles, and by the

ordinary rules applicable to the doctrine of laches. We shall discuss this latter point hereafter more at length.

III.

The point is taken by respondents in Point IV. of the brief heretofore filed that the bill is defective because the proceedings in the original suit are not set forth at length. But this point is without any authority to support it. The only citation is 2 Daniell's Ch. Pl. and Pr., 1585. The language of Daniell on this point is as follows: "A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached." No authorities are cited to support this proposition. None are, of course, needed; for, taken in a reasonable sense, it is a manifestly proper rule, and it is a rule with which the bill in this case fully complies. The bill does "state the decree and the proceedings which led to it, and the circumstances of fraud on which it is impeached" with the most careful detail and fullness.

In *Harbaugh vs. Hohn*, 52 Ind., 245, it is *held* that in a suit to set aside a decree in a foreclosure suit for fraud, it is not necessary to set forth a complete record of the foreclosure suit; and that such a course is only necessary in a bill of review, and that for the reason "that in such proceeding the Court sits as a Court of Errors in some sense, and should have the entire record before it."

IV.

Counsel for respondent, in the brief already filed, devote page after page to the discussion of certain facts alleged to appear by certain records in certain suits, other than the one at bar. If we were to strike out from that brief all that deals with those other suits, and confine the brief to the matters appearing by the record in this suit, there would be but little left to discuss. It is important therefore to consider how far counsel and the Court are at liberty to take cognizance of and to discuss those matters. We contend that the Court can only consider the matters appearing on the face of the record in this suit, and that the Court below erred in travelling beyond the record of this suit to consider the other records referred to, and that counsel for the

respondents err in discussing the matters appearing by those other records.

The cause comes before this Court *on a demurrer to the bill.* The demurrer admits the truth of the bill as it stands, and nothing else can be imported into the case by reference or implication. The Court below could not take judicial notice of any other facts, purporting to be shown by any other record, nor can this Court. Counsel for the respondents claim that by referring in our bill of complaint to the record in the suit of Ketchum vs. Pacific Railroad, and praying leave to refer to the same, we have made the whole record part of our bill, so that they can refer to any portion of that record in support of their demurrer. But not content with this, they have also referred at length to various other suits and proceedings which are in nowise referred to in the bill of complaint, even going so far as to incorporate in their brief a statement as to the pleadings and proceedings in a certain suit alleged to have been brought in the Superior Court of the City of New York. We contend that this is wholly irregular.

Story's Equity Pleadings, Sec. 448, states the rule as follows: "From what has been said as to the nature and office of a demurrer, it is clear that it can be only for objections apparent upon the face of the bill itself, either from the matter inserted or omitted therein, or from defects in the frame or form thereof. It cannot therefore state what does not appear upon the face of the bill; otherwise it would be what has been emphatically called a speaking demurrer — that is, a demurrer where a new fact is introduced to support it."

The rule is stated in 1 Daniel's Chancery Pleadings and Practice, 367, that the effect of referring to a document in the bill by the phrase "as by the said indenture, when produced, will appear" is not to make the document evidence, but to prevent plaintiff from being precluded from availing himself, at the hearing, of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set forth." The document must, nevertheless, be proved at the hearing like any other matter of evidence.

In *Cuddon vs. Tite*, 1 Giff., 395, it was held that, on the argument of a demurrer to a bill, the documents set out in the bill must be taken as therein stated, and no reference to the

original document is permitted to contradict the averments in the bill.

In *Harmer vs. Gooding*, 3 DeG. & Sm., 407, it was held that the usual references in a bill to the document itself, part of which alone is stated, does not entitle a party on demurrer to read the parts of the document which are not set out.

In *Campbell vs. Mackay*, 1 M. & C., 603, it was held that the Court upon demurrer must assume the statement in the bill with respect to the purport of a deed to be true, and the demurring party is not at liberty to read the instrument itself for the purpose of disproving the statement, notwithstanding that, for greater certainty as to its contents, the bill expressly refers to it as being in the demurring party's possession.

In *Ocean Co. vs. Fields.*, 2 Story, 59, a bill was brought in the United States Circuit Court for Massachusetts to set aside a judgment of that Court. Defendant demurred to the bill, and on the argument of the demurrer, counsel for the defendant referred to what took place in the former suit. But Mr. Justice STORY says (p. 77): " Assuming that it was so, still, as the bill admits nothing of this sort, but charges that the facts were unknown until after the judgment, *this Court cannot, upon demurrer, travel out of the allegations of the bill.* The office of a demurrer is to bring before the Court the right to maintain the bill upon the admissions *pro hac vice* of the entire truth of all its allegations, and the Court cannot look *aliunde* to search out or conjecture, what other facts might or did exist to defeat the bill. That is the proper office of a plea or answer."

The fact that the documents referred to are records of the Court does not alter this rule. The Court cannot take judicial notice of its own records in other suits, except so far as they are incorporated by proper proof or averments in the suit which the Court is called upon to determine (see *Ocean Co. vs. Fields, supra*). It is for this reason that a bill for review will be bad on demurrer if it does not state fully the proceedings had in the original suit, because the Court cannot look into its own records in support of the bill.

The only parts of the record, in the suit of Ketchum vs. Pacific R. R., which are set forth in the bill of complaint in this case in full, are the complaint and the decree. Those are sufficient, together with the other allegations in our bill, to show what is necessary for the Court

to pass upon. *No other portions of the records can be referred to on demurrer.* *A fortiori*, cannot the demurring party refer to the record in the suit of Cowdrey and others, or to the record in the *mandamus* proceeding in the matter of *Cutting?* And the height of irregularity is reached when the demurring party interjects into this case the proceedings in New York City in the suit of *Marié vs. Garrison*, which is not so much as referred to in the bill of complaint.

V.

Having thus eliminated from the discussion of this case these preliminary points, we are prepared to discuss the merits of the bill.

The question, then, is, *whether, taking all the allegations of the complaint to be true, the complainant has stated a case for equitable relief.* The main objections raised to the bill upon the merits are, *laches*, acquiescence and ratification.

VI.

It is urged that the bill was not filed promptly, and that complainant has been guilty of *laches.*

The question of laches is one which is not to be determined by hard and fast rules, or by an arbitrary computation of time. It is in all cases a question to be determtned in view of the particular facts of the case. *Laches* properly means *inexcusable delay*—neglect to do a thing at the proper time. It is a question, not of time alone, or primarily, but of good conduct, good faith, due regard to the rights of all concerned. If a sufficient reason is shown why the bill was not filed more promptly, the objection of *laches* will not be sustained.

In this case we show that immediately upon the rendering of the decree in the foreclosure suit of *Ketchum vs. The Pacific R. R. Co.*, an appeal was taken, at the instance of the stockholders, to the Supreme Court of the United States; that this appeal coming on to be heard, this Court held that the consent which appeared in the record as having been made by the solicitor of the company to the entry of the decree, was a waiver by the company of any errors

except those relating to jurisdiction, and that, therefore, the Court could not inquire into the questions raised as to the validity of the mortgage or the *bona fides* of the proceedings; and this Court held that relief must be sought by a bill to set aside the decree. Thereupon this bill was filed. This state of facts shows a sufficient reason to excuse the delay. *The company, by taking its appeal, gave notice to the world that it did not acquiesce in the decree, but that it proposed to contest the same by every means in its power.* This bill must, therefore, be considered as dating back to the time of the appeal, since it is but a continuation in another form of the same proceedings then begun.

Much stress is laid by counsel for the respondent on the alleged facts that other parties have become interested in the property sold under the foreclosure proceedings; that a new company has been formed; that new bonds have been issued, and that they have gone into the hands of innocent holders who will be prejudiced by the setting aside of the original decree. But *none of these facts appear in our bill of complaint*, and it is by *the bill of complaint alone*, that the question of laches is to be determined. The bill avers that the new railway company is composed of the same parties who were implicated in the fraudulent decree; that the stockholders in the new company are the bondholders at whose instance the decree of foreclosure was obtained. It is nowhere alleged that the new company has issued bonds which have been sold on the market; and which have gone into the hands of innocent holders. The Court cannot presume that such is the case, and cannot allow a speaking demurrer to be interposed setting up any such facts. The allegations of the bill are, that the new company was formed and is composed of the holders of said third mortgage bonds, which were fraudulently issued; that the holders thereof took those bonds with full knowledge of their fraudulent character; that new bonds were issued by the new road to the holders of the old third mortgage bonds, and that the new company has issued a new mortgage of the property of the Pacific Railroad, to secure the payment of a pretended indebtedness of said company, "which pretended indebtedness did not exist in fact, but the same is a pretended debt claimed to have been due to the holders of said fraudulent third mortgage bonds." If any of these bonds have gone into the hands of innocent holders or have passed out of

the possession of the original corporators of the new railroad or of the third mortgage bondholders, this fact must be set up by answer and proved as a defense to this suit.

No such facts appear in this suit on the record as it stands.

VII.

Nor is there anything on the face of the record to show such *acquiescence* or *ratification* of the fraudulent transactions set up in the bill as to estop the company from bringing this suit.

Here again we must lay aside all the impertinent, irrelevant and extraneous matter introduced into the respondents' brief in regard to the alleged meetings of stockholders, &c., &c.

The corporation complainant is *a trustee for each and every one of its stockholders.* As such trustee it now seeks to set aside transactions which it alleges were carried out by fraud and collusion, and by breach of trust on the part of its officers and directors. It cannot be estopped from bringing this suit by showing that nine hundred and ninty-nine out of one thousand of the stockholders acquiesced in or ratified the fraud complained of, if the one-thousandth stockholder did not acquiesce in and ratify the transactions. It rests upon the defendants to show affirmatively that all the stockholders acquiesced in or ratified the transactions, in order to make a complete defense to this suit. No such allegation appears in the bill, nor anything from which such a fact can be inferred.

"The directors of a corporation act as trustees for the stockholders. If they do an unauthorized act, the stockholders may ratify it, if they have full knowledge of all the circumstances of the case, but not otherwise. For some purposes a majority of the stockholders may ratify such an act, but in others, as where a director in a company sells land belonging to it, and purchases the same himself, *the majority have no right or power to bind the minority by a ratification.*"

Angell & Ames on Corporations, § 304.

In *Cumberland Coal Co. vs. Sherman*, 30 Barb., 553, Judge DAVIES, after stating the principle that directors are trustees for stockholders and cannot be allowed to buy or sell for their own benefit property of the corporation, discusses the question

whether there had been a ratification by the stockholders by a resolution passed at a stockholders' meeting and he says (p. 577) that "even if the confirmation had been legally made, and by a majority of the stockholders, which it clearly was not, when, as in this case, it was to be made by a class, *the sanction of a major part will not be obligatory on the rest;* but the confirmation, to be complete, must be the *joint act of the whole body.*"

In *Hazard vs. Durant*, 11 R. I., 195, it was *held* that a corporation cannot gratuitously condone or release the fraud of an officer, *except by a unanimous vote of its stockholders.*

DURFEE, C. J., says (p. 207): "Indeed, to hold that a corporation could gratuitously condone or release such a fraud by anything short of unanimous consent, would be monstrous; for it would be in effect to hold that a president or director, who can control a majority vote in the corporation, may rob or despoil it with impunity. * * * A mere majority, in our opinion, could no more condone such a wrong gratuitously than it could originally have sanctioned it."

And see Morawetz on Private Corporations, §§ 76, 390.

See also language of Vice-Chancellor Wood in *Awtool vs. Merryweather*, L. R., 5 Eq., 464, note.

VIII.

Even if *all* the stockholders may be presumed to have known of the transactions which were taking place, which is of itself a violent presumption, this would not amount to an acquiescence and ratification by each and every one of them in a case of such *gross and palpable fraud.* A single stockholder was surely not called upon to assume the burden of a costly and wearisome litigation, such as this has been, by filing a bill in equity to restrain the consummation of the fraud, when those, whose duty it was to protect his interests, were perpetrating the fraud. A stockholder has a right at any time to call upon the corporation itself to assert its rights on his behalf.

The cases which hold that equity will not interfere to release against a judgment, except where the party was ignorant at the time the judgment was taken, of the facts which he sets up as ground for relief, are none of them cases where the ground for relief is *fraud* and *collusion.* In the latter class of cases, it

is not necessary to show ignorance, unless the rights of third parties have intervened.

The cases referred to where ignorance has been held a necessary averment, are cases where a party seeks to avail himself of some legal or equitable defense of which he might and should have availed himself in the former suit or during its pendency.

Thus Chancellor KENT states the rule in *Barker vs. Elkins*, 1 Johns.Ch., 466: "A defendant cannot come here for a new trial, when *no special ground of fraud or surprise is suggested*, and when he neglects, or omits due diligence, and without due excuse, to defend himself in his proper place."

None of the cases cited by counsel for the respondents and none of the cases in the books, hold the astounding doctrine contended for by counsel in this case, that a party who has knowledge that a gross and outrageous fraud is being perpetrated upon him by his adversary in a law suit, through the connivance and collusion of his own attorneys and agents, is bound to interpose before the consummation of the fraud, or is forever estopped from asserting his rights or redressing his wrongs. No such principle can be allowed, except in a case of gross *laches*, or except where the rights of third parties have intervened. The general rule is that a fraudulent judgment or decree is a *nullity*, and will be so declared by a court of equity at the instance of the party aggrieved thereby. It would be an anomalous rule indeed for a court of equity to apply, to allow the wrongdoer to defend himself on the sole ground that the aggrieved party did not interfere and *prevent him from doing the wrong*.

"Fraud will vitiate a judgment, and a court of equity may declare it a *nullity*. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon."

Wingate vs. Haywood, 40 N. H., 441.

In *Nelson vs. Rockwell*, 14 Ill., 375, a suit in equity was sustained to set aside a judgment founded upon a fictitious claim, and through the collusion and connivance of an attorney appearing for the defendant, and the Court held that the fact " the party had notice of the judgment in time to have appealed the case by *certiorari* under the statute, and that he made an abortive attempt to do so, does not deprive him of the right to apply to a court of equity for relief against the fraud which has been perpetrated."

The cases cited by counsel for respondents do not sustain their position in this particular. Thus, in the case of *Twin Lick Oil Co. vs. Marbury*, 91 U. S., 586, it was held, that a director may lend moneys to a corporation and may purchase its property at a fair public sale by a trustee under a deed of trust executed to secure the payment of such loans, and the right of a corporation to avoid a sale by reason of fiduciary relations of the purchaser, must be exercised within a reasonable time after the facts are known, or can by due diligence be ascertained; and what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question. The director who purchased the property in that case, it was held, "*committed no actual fraud.*" Whatever wrong he did was purely a *constructive wrong*, by reason of his fiduciary relations to the company. The corporators all knew at the time of the purchase all the facts upon which their right to avoid it depended. It was nearly four years thereafter when the hazard was over, and when his skill, energy and money had made his investment profitable that any claim to or assertion of right in the property was made by the corporation of the stockholders.

In the case at bar the wrongdoing complained of was not a mere technical or constructive breach of a fiduciary relation by a purchase at a judicial sale, but it was, if the allegations of the bill of complaint are true, and they stand admitted by demurrer, *a gross and outrageous fraud*, in that the officers of the company consented to a decree of foreclosure and sale, founded upon a void mortgage, the bonds secured by which were owned by themselves, and participated in a sale, the sole object of which was to procure the property of the company for their own benefit and in fraud of the rights of the stockholders and of the company. It does not appear that all of the corporators knew of the facts at the time, except as such fact may be inferred by aid of presumptions, and it does appear that immediately after the sale the stockholders did take steps to assert their rights. We are, therefore, entitled to the benefit of the rule laid down by the Court, that what constitutes a reasonable time in any particular case must be arrived at by a consideration of all the elements which affect that question.

The case of *Hotel Co. vs. Wade*, 97 U. S., 13, which is also relied on by counsel for the respondents, is equally far from sus-

taining their position. In that case the stockholders had *actually sanctioned* a contract under which moneys were *in good faith* loaned to the corporation by its directors, and its bonds therefore secured by mortgage, were given, and the moneys were *properly applied to the use of the corporation*, and it was held that the corporation was estopped from setting up that the bonds and mortgage were void, by reason merely of the trust relations which the directors sustained to it.

The distinction is very manifest between a transaction which is in itself fair and honest and open, but which is voidable by reason of the fiduciary relations of the parties, and a transaction which is in its essence fraudulent and corrupt.

In the former case a corporation may be estopped by the mere acquiescence or ratification of its stockholders as a body, and by knowledge on the part of the stockholders of the transaction, while in the latter case nothing beyond an actual acquiescence in and a ratification by each and all of its stockholders, with full knowledge of the facts, is sufficient to estop the company from asserting its right to set aside the fraudulent transaction.

In *Wetmore vs. St. Paul & Pacific R. R. Co.*, 3 Fed. Rep., 177, referred to by Judge McCRARY in his opinion in the Court below, it appeared affirmatively that since the foreclosure sale, which it was sought to set aside, a new company had been organized, "with a *new set of directors*, a *new set of stockholders* very largely, and, *above all, a new set of bondholders*," the new bonds of the new road "being held all over the world." No such facts appear in this case. On the contrary, our bill expressly avers that the stockholders of the new company which purchased our road at the foreclosure sale are *the very same men* who perpetrated the fraud, being in fact the third mortgage bondholders at whose instance and for whose benefit the foreclosure sale was effected, and it is further averred that the bondholders of the new company are these same parties. It is nowhere alleged, nor is anything alleged from which the inference can be drawn, that the bonds of the new company have been put on the market or have passed into the hands of innocent third parties. Upon this demurrer the contrary must be taken to be the fact.

Again, in the Wetmore suit, it appeared that "the foreclosure was manfully resisted by the corporation for three or

four years" (see opinion of Mr. Justice MILLER, p. 178); "that it was just and right to foreclose the mortgage and sell the road" (p. 179), and that there were *no such evidences of fraud* as to justify the Court in entertaining a bill to set aside the sale (p. 182). This decision of Mr. Justice MILLER in the Wetmore case is, therefore, in no just sense an authority against us in the suit at bar.

We fail to see how the case of *U. S. vs. Throckmorton*, 98 U. S., 61, also cited by Judge MCCRARY in his opinion below, is any more pertinent as an authority against us than the case of *Wetmore vs. St. Paul & Pacific R. R. Co.*, just considered.

In the Throckmorton case the United States had waited twenty years before seeking to impeach the decree complained of, and it was not averred in the bill that any of the attorneys, agents or officers of the Government were false in their duty to it, or that they "assisted or connived at the fraud" (see p. 62). Mr. Justice MILLER states with great force and clearness the principles on which courts of equity proceed in this class of cases. After enumerating cases where suits to set aside a decree for fraud or error will not lie, the remedy being by a motion for new trial, a writ of error, an appeal, or a bill of review, the learned Justice proceeds (p. 65):

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, *there was, in fact, no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from Court, a false promise of a compromise, or where the defendant had no knowledge of the suit, being kept in ignorance by the acts of the plaintiff, *or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest* to the other side—these and similar cases, which show that there *has never been a real contest in the trial or hearing* of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

And where, as in this case, we aver that our officers, agents and attorneys fraudulently and collusively procured and allowed a judgment of foreclosure, what matters it that

the stockholders knew of the fraud at the time? The corporation was not under their control. The stockholders individually were not bound to commence a suit. The wrongdcers cannot be heard to complain that the defrauded stockholders did not individually intervene in the fraudulent and collusive suit; nor can the wrongdoers be heard to complain that the corporation itself did not resist their corrupt acts when they themselves controlled the corporation and wrongfully acted in its name to accomplish their own results.

Nobody but the wrongdoers themselves are before the Court asserting laches, acquiescence and ratification as a bar to this bill; nor does it appear that there is any one but the wrongdoers who will be affected by this decree.

We repeat that the *wrongdoers themselves* cannot set up our *knowledge* of their wrongful acts as a bar to our repudiating those acts. It is only *innocent third* parties who could set up such a defense.

In *Clark vs. Underwood*, 17 Barb., 221, the Court says, per Johnson, *J.*: "Fraud not only vitiates all sales and conveyances into which it enters, but the power and authority to sell and convey also, from whatever source derived. An order giving a party authority to sell and convey, fraudulently obtained from a Court, is no better than a power fraudulently derived from the party whose rights are injuriously affected by it. It may always be annulled at his instance upon establishing the fraud, at least as to all parties who were parties or privies to such fraud. *No rights acquired in good faith* intervene here, and there is no obstacle to placing the parties again in *statu quo*."

A judgment or decree obtained fraudently is regarded not only as a fraud upon the parties aggrieved, but as *a fraud upon the Court*, and will be set aside by a Court of Equity on a bill filed for that purpose.

In *Loyd vs. Munsell*, 2 P. Wms., 74. which was a bill to redeem certain property, which the defendant claimed under a decree in his favor, the bill charging that the decree was fraudulently obtained, the Lord Chancellor (Macclesfield) said that "all these circumstances of fraud ought to be answered, which the defendant has been so far from doing, that he only pleads that decree and report as a bar;" that "if these matters of fraud laid in the bill are true, it is most reasonable that the de-

cree should be set aside;" and that "such a gross fraud as this was *an abuse on the Court*, and sufficient to set any decree aside."

In *Kennedy vs. Daly*, 1 Schoules & Lefroy, 355, Lord Chancellor Redesdale, after stating the circumstances in obtaining a fraudulent decree, says: "Now these proceedings, carried on under these circumstances, *were a fraud on the Court*."

And see:

Wright vs. Miller, 8 N. Y., 9.
Davis vs. Tileston, 6 How., 114, 120.
Dobson vs. Pearce, 12 N. Y., 156.
State of Michigan vs. Phœnix Bank, 33 N. Y., 9.
Dederer vs. Voorhies, 81 N. Y., 153.
Clark vs. Underwood, 17 Barb., 202.
Doughty vs. Doughty, 12 C. E. Gr., 315.
Harris vs. Cornell, 80 Ill., 55. (See this case also as to *laches*.)

IX.

It follows from the principles set forth in the preceding points that even if the Court were at liberty to consider the extraneous matter imported into the case, with a view to show knowledge and acquiescence on the part of stockholders of the complainant corporation, even if we were bound to meet these and other irrelevant allegations upon the argument of this demurrer, instead of having them duly presented upon the trial of an issue of fact, where we could present counter proofs and counter allegations; yet even in such case we are entitled to the judgment of the Court in our favor.

Admitting all the highly-colored statements of fact of the defendant as if duly embodied in the record in this suit, it still does not appear that this corporation, representing each and every stockholder, is estopped from impeaching this fraudulent decree as against its own recreant officers and their co-conspirators in fraud.

But we are so well satisfied that this Court will act upon the well settled and wisely ordered rules of equity in deciding this demurrer, and will refuse to try an extraneous issue of fact

upon an *ex parte* statement of matters *de hors* the record that we shall not waste time or space in combating this *ex parte* statement. We are here to argue this case upon this record, and not some other case upon a confused jumble of other records not before the Court and alleged transactions known only to counsel.

X.

Some points are raised by the demurrers which were not insisted on in the Court below, and which are not referred to in the brief heretofore filed in this Court on behalf of respondents. Hence we have not discussed them, relying on the rule that points not specially brought to the attention of the Court are deemed to be waived. Should any of these points be urged by counsel for the respondents, we shall ask leave to submit a supplemental brief covering those points.

XI.

The decree of the Court below should be reversed, and the demurrers should be overruled.

D. H. CHAMBERLAIN,
WM. B. HORNBLOWER,
For Appellant.

116-505

SUPREME COURT U.S.
FILED
APR 15 1884
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

PACIFIC RAILROAD,

Appellant,

vs.

MISSOURI PACIFIC RAILWAY COMPANY et. als.,

Respondents.

STATEMENT AND ARGUMENT

IN BEHALF OF THE RESPONDENTS

BY

MELVILLE C. DAY,

Counsel for Respondents.

NEW YORK:
C. G. BURGOYNE, PRINTER, 57, 59 & 61 PARK STREET.
1884.

In the Supreme Court of the United States,

OCTOBER TERM, 1883—No. 346.

PACIFIC RAILROAD

AGAINST

MISSOURI PACIFIC RAILWAY COMPANY ET AL.

Appeal from the United States Circuit Court for the Eastern District of Missouri.

Respondents' Statement and Brief.

I.

ABSTRACT OF THE ALLEGATIONS OF THE BILL OF COMPLAINT, THE DEMURRER TO WHICH WAS SUSTAINED IN THE CIRCUIT COURT.

1.

This suit instituted on June 26th, 1884, is in behalf of the Pacific Railroad as sole complainant, and against the following defendants, viz.: The Missouri Pacific Railway Company (which acquired the property of the Pacific Railroad subsequent to its sale in the foreclosure suit), Cornelius K. Garrison, William

R. Garrison, Oliver Garrison, D. R. Garrison, Jay Gould, Russell Sage, A. V. Stout, George J. Forrest, Webb M. Samuel, Joseph L. Stephens (who are averred to be, or to have been, directors of the Missouri Pacific Railway Company), Henry F. Vail and James D. Fish (trustees under the deed of trust which was foreclosed), Henry F. Vail and James D. Fish (trustees in the "improvement" bond trust), A. V. Stout and T. B. Edgar (trustees in the "income" bond trust), Thomas W. Pierce, James Seligman, George E. Ketchum (who, with C. K. Garrison, were the complainants in the foreclosure suit), the Central Trust Company (the trustee in the new mortgage made by the Missouri Pacific Railway Company), and James Baker (who was the purchaser of the property at the foreclosure sale).

2.

The bill avers that on the eleventh day of November, 1875, George E. Ketchum filed his bill of complaint in the Circuit Court against the Pacific Railroad and others. The substance or tenor of the bill of complaint is not set forth, but is referred to as "hereunto annexed, marked 'Exhibit A,' to which your orator begs leave to refer with the same effect as if here set out at length, and he makes the same a part hereof." The decree of foreclosure of the property of the complainant was rendered on June 6, 1876, and a sale had in pursuance thereof on September 6, 1876, which sale was confirmed by the Court on October 6, 1876. The decree of the Court and the deed of the Master making the sale, and the order confirming the sale, are not described, but "are hereunto annexed and made a part hereof as 'Exhibit B' and 'B continued.'" That complainant sought redress for its alleged injuries by taking an appeal, on February 1, 1877, from the decree and order confirming the sale, to the Supreme Court of

the United States, and that the Supreme Court confirmed the decree in April, 1880.

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That certain property was embraced in the decree and Master's deed not covered by the mortgage, and not authorized by the complaint.

4.

That prior to June, 1872, the officers and directors of the Atlantic and Pacific Railroad Company procured the control of a majority of the stock of the Pacific Railroad, and thereby procured a lease to be made from the latter to the former company, dated June 29, 1872, "which is herewith set out as 'Exhibit C;'" thereupon the Atlantic and Pacific Railroad Company entered into possession of the property of the Pacific Railroad; that the Atlantic and Pacific Railroad Company falsely represented that charges had been incurred which were proper obligations of the Pacific Railroad, and thereupon and thereby procured the last named company to issue income bonds dated August 27, 1872, for $1,500,000, and improvement bonds dated December 11, 1874, for $2,000,000, and third mortgage bonds dated July 10, 1875, for $4,000,000. All these different bonds are averred to have been created and issued wrongfully and without authority, and that the defendants, either at their inception or by subsequent subrogation, had knowledge of the frauds and misconduct referred to in the bill; and that the making of the lease and bonds were part of a general scheme entered into on the part of the defendants and others to procure the foreclosure and sale of the Pacific Railroad. That in accordance with that scheme, "James Baker, one of the trustees of said Pacific Railroad, and its general attorney, together with Andrew Pierce, also a director in said

Pacific Railroad, and with others to your orator unknown, confederated together with the defendants in this case, or with some of them, for the purpose of instituting proceedings to foreclose the third mortgage, and procured George E. Ketchum to allow his name to be used as complainant in the bill; and service of subpœna having been made upon said Baker, he, without any authority from the Pacific Railroad, filed his answer in the case. The complainant (12) "prays liberty to refer to the files and records of said United States Circuit Court in the case of *George E. Ketchum vs. Pacific Railroad et al.*, to show the collusive, irregular, and fraudulent character of the legal proceeding instituted with the advice of said Baker, counsel of your orator."

5.

That James Baker (13) became the purchaser of the property under the decree, and subsequently transferred the same to the Missouri Pacific Railway Company, which has since continued to be in possession and enjoyment of the property and its earnings; and that the last named company was created by an organization of the holders of the mortgage bonds which had been foreclosed; and on November 1, 1876, issued its own mortgage on the property for the sum of $4,500,000, in which mortgage the Central Trust Company, defendant, is now the trustee.

6

Various matters of error, declared to exist in the record in the Ketchum case, are set out in the thirty-fourth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty first and forty-second clauses of the bill, which clauses relate solely to matters of alleged error which, if errors at all, are apparent in the record of that case.

7

"Your orator avers (p. 20) that although said decree recites that it was entered on its consent, yet it says that it never did consent to the entry of said decree, or authorized any person, attorney, solicitor, or counsel to assent to it in its name, or in any other manner; that the alleged consent by James Baker was unauthorized and illegal."

8

The bill prays (31) for a cancellation of the income, improvement, and third mortgage bonds, as well as the mortgage made by the new corporation; for the annulling of the decree of foreclosure, and for an accounting against the Missouri Pacific Railway Company and its officers for all of the earnings and profits which have been received by them from the railroad since the new company came into its possession.

The above, it is believed, summarily expresses the substantial charges of the bill of complaint, favorably for the complainant.

II.

IF THIS IS AN ORIGINAL SUIT AS CONTRA-DISTINGUISHED FROM AN AUXILIARY OR DEPENDENT SUIT, THEN THE COURT HAD NO JURISDICTION; AND IT IS ALSO BARRED BY LIMITATION.

1.

At the argument in the Circuit Court the counsel for the complainant contended (93) that the suit was

an original one to impeach the decree for fraud; and McCRARY and TREAT, JJ., so regarded it, and asserted (97) that the question of jurisdiction was an important one, though they did not consider it necessary to decide it.

It seems to be well settled, that if proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding.

Couch vs. Couch, 18 Ohio, 146.
Sahlgard vs. Kennedy, 2 Fed. Rep., 295.
Barrow vs. Hunton, 99 U. S., 82.

In the last case Mr. Justice BRADLEY says:

"If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category" (*i. e.*, "a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it").

On the other hand, if the proceedings are tantamount to a bill in equity, to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding."

2.

The substantial controversy in this case is between the Pacific Railroad, complainant, and the Missouri Pacific Railway Company, both citizens of the State of Missouri. T. B. Edgar, one of the trustees (5) of the income bonds, which (31) the bill seeks to have cancelled, is also a citizen of the same State as the complainant.

If, then, this is an original suit, the Court below had no jurisdiction to entertain it.

Dunn vs. Clark, 8 Pet., 12.
Clark vs. Matthews, 12 Pet., 164.
Jones vs. Andrews, 10 Wall., 333.
Barrow vs. Hunton, 99 U. S., 82.

3.

An original bill to set aside a decree on the ground of fraud will, in the absence of special circumstances, be limited to the same time as for instituting a bill of review, or for the taking of an appeal, which is two years in the Federal Courts.

Story's Eq. Pl., § 419.
Evans vs. Bacon, 99 Mass., 213.
Plymouth vs. Russell Mills, 7 Allen, 438.
Quære, see Thomas vs. Brockenbrough, 10 Wheat., 146.
Opinion of McCrary & Treat, JJ., Rec., p. 97.

III.

IF THE ACTION BE TREATED AS A BILL OF REVIEW, IT CANNOT BE SUSTAINED.

1.

If it is to be regarded as a bill of review, instituted *for the correction of errors apparent of record*, then it is barred by reason of the fact that five years had elapsed between the rendering of the decree and the bringing of this action.

This Court has decided that the same limitation must be applied to bills of review of this class as to the taking of appeals, which is (Rev. Stats., § 1008) two years.

Thomas vs. Brockenbrough, 10 Wheat., 146.
Whiting vs. Bank, 13 Pet., 15.
Kennedy vs. Bank, 8 How., 586.
Ricker vs. Powell, 100 U. S., 109.

No bill of review can be maintained for any errors apparent of record, for the further reason that those

have already been passed upon by this Court on Appeal, in 101 U. S., 289.

Story's Eq. Pl. Sec's., 408, 410.

2.

If the suit is a bill of review based in whole or in part *upon matters of fact discovered since the rendition of the decree*, it cannot be sustained for the reason that no leave of the Circuit Court was asked or obtained authorizing such a bill to be filed; which leave is indispensable.

Story's Eq. Pl., Secs. 412, 414.
Smith's Ch. Pr., 51.
2 Daniel's Ch. Pl. & Pr. (4th Ed. pp. 1575-6-7-9. 1584.
Ricker vs. Powell, 100 U. S., 109.
Opinion of McCrary & Treat J. J., Rec., p. 93.

IV.

THE BILL OF COMPLAINT IS DEFECTIVE for the reason that it fails to set out either the substance or the tenor of the income bonds, the improvement bonds or of the third mortgage bonds, all of which are sought to be annulled; or of the Ketchum bill of complaint or other pleadings in that case, or of the decree or other record proceedings which are sought to be assailed; and no description is given of the property involved in the foreclosure suit and which is now sought to be recovered.

The description of the property and the substance and tenor of the legal proceedings sought to be set aside, as well as the circumstances of fraud upon which they are attempted to be impeached, should be affirmatively averred in the *body of the bill itself.*

2 Daniel's Ch. Pl. & Pr., 1585.

V.

THE BILL OF COMPLAINT ON ITS FACE AVERS NO FACTS SUFFICIENT TO AUTHORIZE EQUITABLE RELIEF.

There is no averment in the bill, that either the Pacific Railroad or its stockholders were, at any time, ignorant of the acts of fraud and misconduct alleged and complained of at the very time of their occurrence; and no excuse is given for the delay in instituting the present proceeding.

There is no suggestion in the bill that the stockholders had not at the time the power to prevent the consummation of the various frauds complained of.

It is nowhere averred that any of the different issues of bonds or the stock of the new company sought to be invalidated were at the time of the institution of this suit still held by the original parties, or by parties having any knowledge of the fraud asserted in the bill of complaint.

And the bill does affirmatively show that the stockholders of the Pacific Railroad were cognizant of, or were put upon inquiry as to, the existence of the alleged frauds, upon which they now rely, before the decree was rendered.

The bill avers (p. 17):

35th. Your orator avers that the directors refused, on the demand of holders of capital stock to the amount of 10,000 shares, or $1,000,000, to make a motion in the name of the corporation to set aside said decree, and also refused to allow said stockholders to use the name of the corporation to set aside said decree. (Motion to dismiss-p. 47.)

36th. That the directors refused to authorize other counsel to act for the corporation in resisting this great fraud, the foreclosure and sale of the railroad, and that after the stockholders, at an annual meeting, had passed a resolution unanimously requesting the directors, previous to the entry of the decree, viz., March 27, 1876, to employ counsel other than James Baker to protect the corporation.

(Record U. S. Supreme Court No. 242, p. 5, and motion to dismiss, p. 16.)

(p. 19) 45th. Your orator avers that at the time said foreclosure suit of Ketchum, *et al.*, was commenced the pecuniary interest of the directors of your orator's corporation therein was very small; some of the directors owned no stock, others very trifling amounts; that the stockholders of your orator, in writing, requested said directors to resign, that others might be appointed in their place who would properly attend to the duties of their office, which said directors refused to do. The stockholders of your orator also requested said directors to employ counsel other than James Baker to defend the suit of said Ketchum; this also the said directors refused to do; but they allowed said James Baker, who had caused the complaint of Ketchum to be prepared before the cause of action arose, and had also caused the subpœna to be served upon himself to put in an answer to said complaint admitting the truth of all its material averments, when said directors knew, and said Baker knew, the averments were many of them false in fact and that the mortgage was made to be foreclosed at once: and thus to take all your orator's property from it.

All of the stockholders of the company must be presumed to have known of the affairs discussed at the annual meeting above referred to.

Phosphate of Lime Co. vs. Green (L. R.) 7 Com. Pl., 63.

Under the circumstances, the averments of the bill show such *laches* as to preclude the complainant from any equitable relief.

Wetmore vs. St. Paul, etc., Railroad Co., 3 Fed. Rep., 177.

Opinion of McCrary & Treat, J.J., Rec., 94.

This Court can hardly be oblivious of the fact that the proceedings in the Ketchum case were, in view of the character of the property and the magnitude of the interests involved, matters of general notoriety. Every presumption also exists that the stock and bonds of the new corporation had, during the ~~five years~~ that had elapsed prior to the institution

of this suit,' passed into the hands of innocent purchasers.

Under these circumstances the language used by Mr. Justice Campbell in *Zabriskie vs. Railroad Co.*, 23 How, 400, seem very pertinent to the present controversy. He says:

"It may be that among the stockholders, and within the corporation, the cause of this procrastination and hesitancy to act upon the subject may be estimated properly. But we are to regard the conduct of the corporation from an external position. The community at large must, form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the meeting of the stockholders, and by their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded. A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

Where a contract made by a corporation was attacked as *ultra vires* and it appeared that a mortgage had been made under and on the faith of it, and bonds issued which had passed into the hands of *bona fide* purchasers, that four years had elapsed and that in the nature of things it was impossible to place all parties as they were before the contract was executed, it was held on demurrer, per Drummond, J., that it was not competent for the corporation or its stockholders to nullify the contract on the ground of *ultra vires*.

Dimpfel vs. Railway Co., 8 Reporter, 641.

"It is a well settled rule of law that when the right to rescind springs from discovered fraud, the party defrauded must rescind as soon as circumstances permit, or in other words at once on discovery of the fraud. He is not bound to rescind, and any delay, especially if it be injurious to the other party, amounts to a waiver of this right. 'Mere lapse of time,' says Mr. Parsons, 'if it be consid-

erable, goes to establish a waiver of this right, and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period by the exercise of ordinary care and intelligence, it would almost be conclusive.'"

Cummins vs. Lodes, 2 Fed. Rep., 662.

A stockholder knowing that a wrongful and unauthorized act is being done by his company, should make application to a court of equity to prevent it; and if he does not assert his right with diligence he thereby gives rise to a new equity against himself.

Graham vs. Railway Co., 6 Eng. L. & Eq., 134, 136.

Hodges vs. N. E. Screw Co., 3 R. I., 18, 19.

VI.

IF ANYTHING OUTSIDE OF THE BILL OF COMPLAINT ITSELF IS TO BE EXAMINED IN DETERMINING ITS SUFFICIENCY, THEN THE ENTIRE RECORD PROCEEDINGS OUT OF WHICH THE DECREE ORIGINATED, OR RELATING TO IT, SHOULD BE CONSIDERED.

The bill of complaint refers to exhibits to show the nature of the decree and other proceedings in the Ketchum suit. It also frequently refers, and prays reference to the proceedings in that case had in the Court below, as well as to those had in this Court on the appeal, including certain affidavits and motions that were filed in this Court. These references are as follows:

(12) "Your orator prays liberty to refer to the files and records of said United States Circuit Court, in the case of George E. Ketchum vs. Pacific Railroad *et al.*, to show the collusive, irregular and fraudulent character of the legal proceedings," &c., &c.

The Ketchum record in this Court is referred to as follows:

(16) "Rec., p. 7;" (17) "Motion to dismiss, p. 47;" (17) "Record U. S. Supreme Court, No. 242, p. 5, and motion to dismiss, p. 16;" (17) "Record U. S. Supreme Court, p. 45;" (18) "See p. 6 of additional exhibit, to reply to motion to dismiss;" (19) "Record, p. 44."

So it seems to have been the purpose of the pleader to make these proceedings a part of his bill, the same as the other exhibits that are referred to.

In any event, a court, in considering a case instituted for impeaching one of its own decrees, whatever the averments of the complainant might be, could hardly ignore the existence of material and conclusive facts apparent in the record itself. If the record exhibits any untraversable fact which, as a matter of law, concludes the complainant, his averment to the contrary should not be permitted to avail him. If there is any traversable fact admitted in the record, which, if true, would bar him from the relief he seeks, he should still be concluded by it unless he affirmatively impeaches the existence of the fact itself in his bill.

The case made by the bill in this case is, as to parties and the subject of controversy, the exact reverse of the suit sought to be assailed. The Court is now solicited to undo what itself has previously done. Such being the case, the Court cannot, certainly, with any propriety, or in justice to itself or the parties to the controversy, be called upon to ignore the recorded facts which influenced its action, or which may be apparent in the record of the case it has decided.

It must be for the interest of all parties to the suit—to the complainant even more than to the defendants—to know at the outset how they stand under the conclusive or unchallenged facts of the record that is now sought to be assailed.

In order to a proper understanding of a decree the

Court looks back into the whole record of the pleadings and proceedings, including orders, master's reports, &c. The record thus made up constitutes the basis of examination on a bill for review.

Putnam vs. Day, 22 Wall., 66, 67.
Story's Eq. Pl. & Pr., § 407 (and note).

(*Memo.*—The respondents submit for the consideration of this Court the record of the Ketchum case in this Court, which will be hereafter referred to as "K. Rec.;" also record proceedings from U. S. Circuit Court containing proceedings in the Cowdrey case, and some in tne Ketchum case, not contained in the other record; this will be referred to as the "C. Rec.")

The proceedings in the case of *N. A. Cowdrey vs. Pacific Railroad et al.*, which was pending in the Court below during the foreclosure suit, was referred to and virtually made a part of the Ketchum suit, and was also referred to by the Court below in the return they made to this Court in the *ex parte Cutting* case (K. Rec., 63; K. Rec., 167, *ex parte Cutting*, 94 U. S., 16, 17).

VII.

THE RELATION OF THE PACIFIC RAILROAD, ITS OFFICERS, COUNSEL AND STOCKHOLDERS, TO THE DECREE OF FORECLOSURE AND THE SALE HAD THEREUNDER.

1.

A meeting (C. Rec., 86) of the stockholders of the Pacific Railroad was held in the City of New York,

Nov. 5 and 6, 1875, being an adjournment of the meeting which was originally called and held in the same city, Oct. 12, 1875. At that meeting, at which stock to the amount of 30,415 shares was represented, and the signatures of the owners actually affixed to the proceedings of the meeting, a resolution was adopted in which—after reciting that the Atlantic & Pacific Railroad, the lessee of the Pacific Railroad, had confessed its inability to perform its contracts, and had been placed in the hands of Receivers, and that great irregularities existed on the part of the Atlantic and Pacific Railroad Company in placing mortgage liens on the property of the Pacific Railroad, through the instrumentality of the existing directors of the Pacific Railroad, and that the directors of the Pacific Railroad had, through their neglect of prompt action, subjected that company to proceedings in bankruptcy against it in the Eastern District of Missouri it was—

"*Resolved*, That we, whose names are hereunto annexed, stockholders to the amount set opposite thereto, respectfully request each and all of the present directors of the Missouri Pacific Railroad Company to severally and successively resign the office of director of said company, and to select such stockholders as their successors in office as the committee hereinbelow named shall designate.

Resolved, That the Atlantic and Pacific Railroad Company being in default in the payment of rent due to us, and confessing itself in open court unable to keep its contracts and obligations, the existing lease of our railroad to that company should be cancelled; and that the committee hereinafter appointed are hereby instructed to take all proper and reasonable steps for that purpose. To this end they are requested, if deemed by them best for our interest so to do, to join with the County of St. Louis in prosecuting the bankrupt proceedings, to the extent of getting an assignee of bankruptcy appointed, with instructions to procure an order of Court cancelling said lease, or discharging its receiver from the custody and control of our railroad.

Resolved, That Messrs. N. A. Cowdrey, Jacob Cromwell, Peter Marie, A. W. Shepard, George R. Fearing, F. A. Otis, and William H. Morell be, and they are hereby appointed a committee on the part of the stockholders to carry these resolutions into effect."

2.

On November 11, 1875, the Ketchum bill of foreclosure was filed; and on November 13, 1876, Cowdrey filed his bill of complaint in the same Court. In the latter suit it appears (C. Rec., p. 1) that on November 15th, affidavits were filed; November 22d, there was "notice of motion for an order to appoint examiners to take testimony orally;" November 26th, "affidavit filed;" December 6th, appearance of various defendants entered; and on December 11, the following order of injunction was obtained (C. Rec., 98):

> This day come the said parties, by their respective solicitors, and a motion for a provisional injunction herein against the defendants, not to transfer or dispose of certain bonds in said motion named, being submitted to the Hon. SAMUEL TREAT, one of the Judges of this Court, at Chambers, and the matters and things therein being fully considered, it is ordered that the said defendants, to wit: the Pacific Railroad, the Atlantic and Pacific Railroad Company, Dwight Durkee, James Baker, Samuel Hays, M. J. Lippman, D. R. Garrison, John Taussig, Oliver Hart, D. K. Ferguson, T. B. Edgar, Rufus J. Lackland, Webb M. Samuel, Andrew Peirce and Thomas T. Buckley, and each and every of them, be and they are hereby enjoined and restrained from transferring and disposing of, or in anywise pledging, subjecting to sale, transfer or pledge, any of the Income or Improvement bonds, or any of the five hundred thousand dollars ($500,000) bonds, for which Seligman & Baker are trustees, or any of the Third Mortgage bonds, in the bill of complaint mentioned and set forth, until the further order of this Court.
>
> It is further ordered, that a temporary injunction, under seal from this Court, be issued, upon the plaintiff filing an injunction bond, in the sum of twenty thousand dollars ($20,000) with sureties, to be approved by one of the judges of this Court.
>
> It is further ordered that the motion to discharge the receivers of the custody and control of the Pacific Railroad be, and the same is hereby overruled.

At the time the Ketchum bill was filed, only a portion of the third mortgage bonds had (K. Rec., p. 9) been issued.

It seems (C. Rec., 2) that this bond was never given.

It is to be noted that Cowdrey, when he filed his bill, was acting as *the chairman of the committee of stockholders.*

3.

It appears (C. Rec., 80) that a special meeting of the stockholders of the Pacific Railroad was called by the President of the company, to be held on Tuesday, December 28, in the City of New York. Attached to that call a notice also appears, subscribed by the same committee of stockholders who had been appointed at the meeting of November 5, urging every stockholder to be present, in person or by proxy, at the meeting so called. That meeting, after canvassing various matters relating to the affairs of the company, was adjourned to December 29. It was then (C. Rec., 84)—

"*Resolved*, That it is the wish of the stockholders of the Pacific Railroad of Missouri that separate receivers be appointed for this road, and that no person be selected as such receiver who is the holder of third mortgage bonds, or who is in any manner interested in the Atlantic and Pacific Railroad; and that at as early a day as practicable the Court be requested to order an election for board of directors of the Pacific Railroad of Missouri."

Twenty-nine thousand eight hundred and sixty-four shares were voted in favor of the above resolution, and six thousand three hundred and fifty one against it.

At the same time and place it was further (C. Rec., 84)—

"*Resolved*, That the committee of stockholders of which N. A. Cowdrey is chairman be requested to confer with the committee now here from St. Louis, and select three suitable persons to present to the Court for receivers of the Pacific Railroad of Missouri."

Numerous papers on file, or among the proceedings in the Cowdrey suit (92,94), show that the stockholders were actively soliciting the Court to appoint certain persons by them named as receivers of the railroad. Among the persons so named were Joseph L. Stephens and John H. Beach, who, as a matter of fact, were subsequently appointed as two of the receivers of the Pacific Railroad. And at the time

the appointment was made, it was generally regarded by all parties concerned (though it may not have been so announced by the Court) that these different receivers were appointed with a view of having a representation of the varied interests, if such there might be, both of the dissatisfied stockholders and of the bondholders in the management of the company's affairs, under the supervision of the Court.

4.

On January 4th, 1876 (C. Rec., 2), affidavits of various parties were filed in the Cowdrey suit; and on January 7th (C. Rec., 2) Cowdrey filed an amended bill. On January 8th (K. Rec., 16), Thomas P. Akers, a stockholder of the Pacific Railroad, filed in the Ketchum case, a motion for leave to defend the suit, averring as follows:

"That the above entit'ed cause for the foreclosure of the third mortgage bonds of the Pacific Railroad was filed by the consent of the officers of said Pacific Railroad; that the officers and a number of the directors, being themselves interested in the third mortgage bonds of said railroad, and interested in obtaining possession of said road under said bonds, *do not intend to resist the foreclosure of said mortgage, or make any resistance or defense to said suits.* * * * That as a stockholder he never gave his sanction or consent to the issuing of said third mortgage bonds; that he is informed and believes, and upon information alleges the fact to be, that the pretended consent of some of the stockholders thereto was obtained by false and fraudulent pretences by some of the officers of the Atlantic and Pacific Railroad Company and Pacific Railroad Company; that your petitioner is informed by counsel learned in the law that there exists a good and valid defense against this suit of foreclosure; that unless he is permitted to make answer and defend against said bill, he will be greatly damaged in his interests as a stockholder in said road. Wherefore, your petitioner moves and prays for leave to be granted to him by this Honorable Court to come and defend in said above entitled cause."

5.

On February 7th, 1876, Cowdrey (C. Rec., p. 4) filed a second amended bill in his case, in his capac-

ity of chairman (6) of the committee of stockholders, and (K. Rec., 63) by their express authority. An inspection of that bill (C. Rec., pp. 4 to 32) will show that its averments are essentially the same as those contained in the bill of complaint in this case, so far as regards all charges of fraud, etc., claimed to have existed at that time. And the bill expressly charges, that (16, 19) the directors and counsel of the company did not intend to defend the foreclosure suit, but contemplated having the railroad sold to the detriment of the stockholders, etc. The bill was (32) verified by Cowdrey and was filed by Glover & Shepley, who had since the fall of the previous year (K. Rec., 141) been employed by the committee of the stockholders "*to prevent a foreclosure of the third mortgage.*"

On the same day that Cowdrey filed his second amended bill (February 7, 1876), Thos. P. Akers filed, by leave of Court, an answer and cross bill in the Ketchum case (C. Rec., pp. 32 to 80). Glover & Shepley, the counsel of the committee, appeared also as counsel for Akers. The averments of Akers' cross bill are essentially the same as those contained in Cowdrey's second amended bill above referred to. It seems (K. Rec., 116) that in March, Cowdrey had acquired Akers' stock in the company.

On the same day, with the above proceedings, the Pacific Railroad (K. Rec., 18) filed its answer to the Ketchum bill of foreclosure.

The answer was filed by James Baker as attorney for the company, by J. L. Dearborn, its secretary, and was authenticated by its corporate seal. The answer admitted that the complainant was entitled to the relief sought for in his bill of complaint, and further averred:

"This defendant, further answering, says that the execution and delivery of the said third mortgage bonds, and the mortgage to secure

the same, was done in good faith and for legal and proper purposes, without any fraud or malfeasance on the part of the Board of Directors or the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same. *Therefore, this defendant asks this Honorable Court to permit any of the stockholders aforesaid to become a party defendant to this suit on proper showing, and make such defenses in the premises as they may see proper.*"

The above clause in the answer, as appears by the statement of Mr. Charles P. Chouteau, at that time president of the company (K. Rec., 119), was inserted in order to facilitate the stockholders in procuring leave to defend the foreclosure proceedings in the event that they desired so to do. This answer, which, as will be seen, is within itself a virtual consent to the decree which was subsequently rendered, remained on file, giving full notice to all parties connected with, or cognizant of, the progress of the litigation, of the course the directors intended to pursue, for a period of four months before the decree was actually rendered.

The bill of complaint in this case does not aver that this *answer* was unauthorized by the company, or that Dearborn, the secretary, or that Baker, the attorney of the company, had no authority to file the *answer*, or that the use of the corporate seal was unauthorized. In fact, the bill does declare affirmatively that the *decree* itself was entered by the authority of the corporate officers of the company.

The seal itself is *prima facie* evidence that it was affixed by proper authority; and the contrary must be shown by the objecting party.

Koehler vs. Iron Co., 2 *Black.*, 717.
Masser vs. Johnson, 42 *Mo.*, 74.
Solomon's Lodge vs. Montmollin, 58 *Geo.*, 547.
Ang. & Ames on Corp., § 224.

6.

On March 25th, 1876 (K. Rec., 22) the *committee of the stockholders* filed a motion, in the Ketchum case as follows:

"Your petitioners, Peter Marie, Frank A. Otis, Robert L. Cutting, Jr., and James D. W Cutting, who are citizens of the City and State of New York, George R. Fearing, of the City of Newport and State of Rhode Island, respectfully represent that the said Peter Marie is the owner of one hundred shares of the capital stock of said railroad company; that the said Frank A Otis is the owner of over one hundred shares of the capital stock of said company; that said George R. Fearing is the owner of two hundred shares of said stock, and that Robert L. and James D. W. Cutting, composing the firm of R. L. Cutting, Jr., & Co., are the owners of over five hundred shares of said capital stock; that Thomas P. Akers, a stockholder of said company, has filed his answer and cross-bill to the bill of complaint filed by complainant in this case, and in said answer and cross-bill avers that he files the same, not only for his own benefit as such stockholder, but for the benefit of all other holders or owners of the shares of said capital stock who may come in and contribute to the cost and expense necessary to the prosecution of the same.

"Your petitioners respectfully pray that they may be allowed to come in and defend the said suit, and be made co-defendants herein with the said Thomas P. Akers, and be joined with him as parties defendant herein, with such other stockholders as may desire to join them as such defendants.

"The said petitioners further pray, that they may be allowed to adopt the said answer and cross-bill as their answer and cross-bill in this cause, and to join with him in his prayer for relief in the premises."

The above motion was never brought to the attention of the Court for its action.

7.

On March 27, 1876, the stockholders of the Pacific Railroad held an annual meeting in the City of St. Louis (K. Rec., 59, 132), at which meeting, among others, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, George R. Fearing, and John T. Denny, purporting to act as a *committee of the stockholders*, were present, claiming to control or represent nearly all of the stock of the company.

At that meeting the stockholders unanimously passed the following resolution:

"*Resolved*, That the stockholders request the directors to employ Messrs. Glover & Shepley to aid in defending the company in the foreclosure suit now pending against it, and also the proceedings in bankruptcy pending against the company."

The proceedings of the foregoing meeting show clearly that the stockholders were at that time intrusting Glover & Shepley as counsel in the management of their interests in the pending litigation, who had been previously and specially employed by the committee of stockholders. By the charter of the Pacific Railroad (Acts 1851, p. 268) it is provided (Sec. 2), that—

"At every annual meeting, the said stockholders shall have power to make, alter, or repeal, by a majority of votes given, any or all such by-laws, rules, orders, and regulations as aforesaid, and to do and perform every other corporate act authorized by the charter."

It has been contended all along, by the counsel for the stockholders, that this provision authorized the stockholders to assume or appropriate the functions or powers of the officers of the corporation, and to represent the corporation itself. Whether that contention be true or not, the provision of the charter is certainly broad enough to authorize the stockholders, at any annual meeting, to appoint counsel or agents, other than the regular corporate officers, *to represent them* so far and to such an extent as would preclude them, collectively or individually, from subsequently disputing the authority of the agents or counsel so appointed to act for and represent them. And without the provision of the charter, the acts of their committee so selected would conclude the stockholders.

Railroad Co. vs. Howard, 7 Wall., 415.

8.

It appears that on March 29, 1876, an agreement

was made between the committee of stockholders and C. K. Garrison, who was a large holder of the third mortgage bonds involved in the foreclosure suit; and that they subsequently instituted suit against him in the Superior Court of the City of New York, on the agreement that they claimed he made with them.

The Pacific Railroad admitted in the Ketchum case while on appeal in this Court (K. Rec., 133), the fact that the suit had been instituted, and that an agreement had been made as therein averred.

The plaintiffs in the case against Garrison aver (K. Rec., 104), that at the time of the agreement Garrison claimed to own a majority of the third mortgage bonds; that the bonds were of doubtful validity, and were claimed by the stockholders to be fraudulent; that a suit had been instituted by Geo. E. Ketchum to foreclose the mortgage, and (p. 105):

"That certain stockholders of said Pacific Railroad had, previous to the making of the agreement hereinafter set up, intervened in said foreclosure suit, and filed an answer and cross-bill alleging collusion and fraud on the part of the directors of said Pacific Railroad in the issue of said bonds, and in the mortgage made to secure the payment thereof, and in the defense, or want of defense, made in said foreclosure suit; that some of the plaintiffs above named had filed a petition in said foreclosure suit, to be made parties defendant to said suit, and to be allowed to intervene and defend the same in their own behalf and in behalf of all other stockholders. * * * That on or about the 29th day of March, 1876, *with a view of compromising said conflicting claims* and establishing the validity of said debt of $4,000,000, in the hands of said Garrison, the defendant, Garrison and others of his associate bondholders, *and to prevent the plaintiffs from defending said foreclosure suit, and in consideration of the relinquishment by the plaintiffs of all further opposition to said foreclosure suit*, the said Garrison, the defendant, entered into an agreement with plaintiffs, evidenced in part by a letter written by him to some of the plaintiffs and the defendant Denny, a copy of which is hereto attached, marked 'A,' and the same is made a part of this complaint. The plaintiffs aver that they and the defendant Denny performed and fulfilled all the preliminary obligations in the said agreement contained and agreed to be performed on their part and be-

half, *and in consequence thereof said defendant Garrison was enabled to procure a judgment and decree of foreclosure* on or about the 6th of June, 1876, and a sale of said premises on or about the sixth day of September, 1876, which sale was confirmed by the Court in the month of October, 1876, viz., October 6th, which confirmation was modified October 23, 1876."

(107) "*That without their co-operation and consent the decree of foreclosure and sale would not then have been made, or made at all until after a trial by the Court, the result of which trial was in doubt.* The plaintiffs claiming as above set forth, in relation to the bonds and mortgage given to secure the payment of the same."

It is also averred that the sale had been made under the decree consented to by these stockholders; that Garrison had become the real purchaser of the property, had failed to respond, as they allege, to the terms of his agreement; and damages in a large sum are asked on account of the alleged breach thereof.

The original agreement or letter of Garrison, which is claimed to have induced the consent of the stockholders to the rendering of the decree, is to the effect that Garrison agreed (109), in the event that he became the purchaser of the property at the foreclosure sale, that he would convey the property to any successor company which the stockholders might organize, if within six months from the time of his purchase they should reimburse him the expenses he might have incurred; and they should issue bonds of the new company, to be substituted for the old third mortgage bonds, in case the holders should choose to accept them, otherwise the new bonds should be sold in order to purchase the old bonds. It was expressed that the new company, organized by the stockholders, should issue a capital stock to the extent of $7,200,000, *which stock the said committee of stockholders were to transfer to such of the stockholders of the Pacific Railroad as might have co-operated with them, or as they might think had any legal or equitable claims upon them*

for such stock. All expenses of the various litigations, including the services and expenses of the committee of stockholders with whom the arrangement was made, were to be paid from the earnings of the railroad either by the receivers or the successor company.

The arrangement above detailed which was made between the stockholders, represented by their committee and C. K. Garrison, shows, both by inference and in express language, that at the time of the pendency of the Ketchum litigation, and anterior to the rendering of the decree, *the stockholders of the company regarded themselves as in full possession of the power to resist the foreclosure proceedings.* And it is further evident, that the stockholders were in such a position, by reason of the indulgence granted or proffered to them by the Court of becoming parties to the action, as would have authorized them, irrespective of the merits of their defense, to have created issues in the case, taken testimony, and appeals if they desired, so as to have indefinitely continued the controversy to the prejudice of the interests represented by the complainant. It was, manifestly, that condition of affairs that induced C. K. Garrison to make the agreement which he did with the committee of stockholders. There is no pretence made by the complainant or the stockholders but that this arrangement was deliberately made between themselves and Garrison, *with full knowledge of all the facts, which are now averred for the purpose of challenging the validity of the mortgage that was foreclosed;* and, of course, the arrangement affected them with knowledge of the fact that the decree was about to be or was likely to be rendered; *for the obtaining of such a decree was the very purpose of the arrangement.* The proceedings against Garrison are still pending.

The petition in the case against Garrison was

verified (K. Rec., 108) April 4, 1878, by Robert L. Cutting, Jr., Peter Marie and N. A. Cowdrey. The R. L. Cutting, Jr., who made oath to that petition, is the same one who had all along been one of the committee of stockholders of the Pacific Railroad, and who became the president of that company at its annual meeting held March 26, 1877. The Peter Marie who made oath to that petition is the same one who had continuously been a member of the stockholders' committee, and who now appears as the vice-president of the Pacific Railroad, and in that capacity verifies the bill of complaint in the present case. The N. A. Cowdrey who made oath to that petition is the same one who has all along been acting as the authorized chairman and counsel of the committee of stockholders. As counsel of the stockholders and of the Pacific Railroad, he has industriously plied this Court and the Circuit Court with motions and briefs, in all of which he has charged James Baker with collusion and bad faith in consenting to the decree of foreclosure; which decree, his own verified statement in the Garrison case shows to have been procured and brought about at the express desire of himself, his associates in the committee of stockholders, and the stockholders they represented.

Even if the foreclosure decree and sale were otherwise impeachable, as having been made collusively by the corporate officers and the counsel of the company; still, the suit against Garrison by the representatives of the stockholders manifests a ratification of those acts.

The ratification by the stockholders of a corporation of the unauthorized acts of its agents is equivalent to a previous command, equally as in the case of natural persons.

Ang. & Ames on Corp., § 304.

9.

On April 3d, 1876 (K. Rec., 23), the Court appointed as separate Receivers of the Pacific Railroad Oliver Garrison, Jno. H. Beach and Joseph L. Stephens. It appears (C. Rec., 92–94) that Beach and Stephens had been previously nominated or favorably mentioned for that position by the committe of the stockholders.

The order appointing the Receivers also (K. Rec., 25) authorized Vail and Fish, the trustees in the third mortgage, to exchange such of the bonds secured by said mortgage as were then in their hands for that purpose, for such of the income and improvement bonds as had not been exchanged as provided in the third mortgage deed; and further authorized the Receivers, out of the property and earnings of the railroad, to redeem all bonds or stock belonging to the Pacific Railroad, which had theretofore been pledged or hypothecated to secure any of its indebtedness, which, in their judgment and discretion, would be beneficial to the estate in their charge to pay. In the same decree it was further provided (28):

"It is further ordered that the cross-bill of Thomas P. Akers, heretofore filed, be taken from the files of the Court, as the same is found to be in defective form. It is further ordered that leave be given to Thomas P. Akers, as a stockholder, and the County of St. St. Louis, claiming to be a stockholder or trustee for stockholders, to file an amended cross-bill herein within thirty days, giving security for costs in the sum of $5,000. It is further ordered that leave be granted to the County of St. Louis to make answer to the bill of foreclosure in this case, and defend against the same."

No opposition seems to have been made to the above order appointing the Receivers, and in which the trustees in the third mortgage were authorized to continue changing the third mortgage for "income" and "improvement" bonds, though Cowdrey, as already shown, had obtained in his suit, an injunction from the Court, on December 11, 1875,

which would have forbidden such transfer, if he had seen fit to avail himself of it.

And the fact that two of the parties, who had been named by the committee for Receivers, were actually appointed, carries the presumption that the stockholders had knowledge of what was being done, as well as a potential voice with the Court.

10.

On April 25, 1876, Thos. P. Akers and the County of St. Louis (K. Rec., pp. 28 to 45) filed an amended answer and cross-bill in the Ketchum case. It is the same in substance as the complaints in the Cowdrey suit, and the previous answers and cross-bills in the Ketchum suit. An inspection of that cross-bill will show that it sets forth with great particularity, all of the acts and transactions occurring up to that date, which are asserted in the present bill of complaint; and it is pointedly averred that the counsel and officers of the Pacific Railroad were making no opposition to the foreclosure suit.

11.

On the 6th day of June (K. Rec., 48, 49), the answer and cross-bill of Akers and St. Louis County were withdrawn. It seems (K. Rec., 116) that Cowdrey had previously acquired Aker's interest, and (K. Rec., 142), that Garrison had made some satisfactory arrangement with St. Louis County. On the same day (June 6th) all the defendants having filed answers which admitted, or offered no objection to the relief sought in the bill of foreclosure, all the parties to the suit appeared by their respective counsel, and consented to the decree. The decree on its face declares (K. Rec., 52) that it was rendered "by the consent of all the parties to this suit through their solicitors of record."

In the proceedings in the Ketchum case on appeal in this Court, the affidavits of Mr. Glover and Mr. Shepley were (K. Rec., pp. 140, 141) filed by (K. Rec., 135) the Pacific Railroad, the complainant in the present case. Mr. Shepley in his affidavit said (141):

"The firm of Glover & Shepley had been *prior to* 1876, employed by Peter Marie, N. A. Cowdrey, and same others in proceedings instituted *to prevent a foreclosure of the third mortgage* of the Pacific Railroad in the suit brought by George E. Ketchum and others against said railroad company and others for that purpose, and while, after that time, no opposition was made by said firm, said Glover & Shepley did not consider themselves to be authorized to consent to anything on the part of their clients, and did not consent to said foreclosure, or anything looking to said foreclosure."

He further says that Mr. Baker came to his office and said to him that he had in his hands what he said was the draft of a decree which he proposed to present to the Court; that he did not recollect that he read it.

"*Mr. Baker very likely stated to me its general features.*"

"I neither assented nor dissented, as I had nothing to do in the matter. *My recollection is that I was in Court in April and in June, 1876, when the matter of a decree in the case came up*, but I certainly never urged the Court to render this or any decree in said cause. * * * *I was entirely passive in the matter, neither assenting nor dissenting.*"

The knowledge of Mr. Shepley that a decree was about to be rendered, and subsequently *that it was in the very act of being rendered*, was equally the knowledge of his clients—the stockholders of the company.

Story's Eq. Pl., § 421 (*c*).

To the same effect (140) is the attitude of Mr. Shepley, as stated by his partner, Mr. Glover, which was that Mr. Shepley was "*silent and passive in Court when the decree was rendered.*"

James Baker also filed an affidavit in the proceedings in the same case in this Court, in which he

states (K. Rec., 115) that he was the attorney of the Pacific Railroad during the pendency of the Ketchum suit, and that he filed the answer of that company on February 7, 1876, as the same appears of record. He further states as follows (116):

"In March, 1876, the regular annual meeting of the stockholders of the said Pacific Railroad was held in St. Louis; that at such meeting Messrs. N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, George R. Fearing and John T. Denny, as and purporting to be and to act as a committee of the stockholders, were present, and controlled and voted, in person or by proxy, nearly all the stock; and as such owners and representatives having, as they informed me, as the attorney of the Pacific Railroad, effected a satisfactory arrangement with C. K. Garrison (who was largely interested in the bonds of the road), directed me to favor and assist the bringing of the said foreclosure suit to a decree in favor of the plaintiffs as soon as, under the rules and practice of the Court, it could be done; afterwards, and during the month of April, 1876, an effort was made by the plaintiffs to obtain a decree.

"At that time the said persons above named, or a majority of them, were present in Court, and I distinctly remember that Mr. N. A. Cowdrey, Robert L. Cutting, Jr., and Peter Marie, were present.

"When the matter of granting a decree came up in Court, a stockholder by the name of Akers objected, whereupon Mr. N. A. Cowdrey announced in open Court that Akers was not a stockholder, and that he, Cowdrey, held the very certificate on which Akers based his right to object; and for that reason insisted to the Court that Akers' objection ought not to be entertained.

"Mr. Akers' objection, and that of the County of St. Louis, had the effect to postpone the cause until June, when the suit passed to a decree.

"None of the said stockholders, or committee of stockholders, ever withdrew or modified their previous instructions to me to favor and assist in the procuring of the said decree; but, on the contrary, continued to favor the same."

The understanding of the Judges of the Circuit Court as to the attitude of affairs at the time the decree of foreclosure was rendered, may be gathered from the return which they made to the application for the writ of *mandamus* which was attempted to be sued out in the Ketchum case, in which they say (*Ex parte Cutting*, 94 U. S., 21, 22), (K. Rec., 167):

"On June 6, 1876, * * * said Akers and said St. Louis County withdrew their answers and dismissed their cross-bills, *both*

said Akers and said St. Louis County purporting to act for themselves, and for all other stockholders who might join with them." (K. Rec., 168)

"*Said Cowdrey and all other stockholders who might join with him were in Court during all the proceedings of the term, when the decree of foreclosure and sale was entered, and had the fullest opportunity to intervene by joining in the answers and cross-bills filed by said Akers and said St. Louis County, and otherwise.*

"Still, neither he nor any of the petitioners herein objected to or in any manner interposed against the said consent decree of June 6th, 1876."

In these same mandamus proceedings, this Court seems to have been alive, by conclusions gathered from the record, to the state of affairs that existed at the time the decree was rendered. Mr. Chief Justice WAITE said (*ex parte Cutting*, 94 U. S., 21):

"These petitioners" (referring to N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, and George R. Fearing) "seem to have been content to leave their interests in the hands of Akers, and when he went out they went with him."

That the decree was, in fact, rendered by the consent of the corporation itself, and not simply upon the consent of its counsel, has already been adjudicated. Chief Justice WAITE, rendering the opinion of this Court in the *Ketchum* case, said (11 Otto, 295, 296):

"Early in the progress of the case the company filed an answer under its corporate seal, and signed, with its authority, by its secretary and solicitor of record, in which every material allegation in the bill was confessed; and it was, moreover, positively stated that the bonds sued for were in all respects valid obligations of the company, and the mortgage a subsisting lien. *In every instance in which the stockholders attempted to get into the case as parties, so that they might defend for the corporation, it was asserted that the directors of the company were false to their trust, and that they had either consented to or would not resist a decree. * * * The record showing as it does affirmatively that the company gave its consent to the decree, we need not inquire what we would do if the case depended alone on the consent of the solicitor.*"

12.

The Circuit Court did not adjourn (K. Rec., 166) until June 24, being eighteen days after the decree

was rendered. From the time the decree was rendered until after the sale was had by the Master on September 6, there was, so far as appears, no voice of protest or objection raised, in or out of Court, by any stockholder, or by any other person interested in the company, against the decree which had been rendered. It was not until after the sale was had, and after the stockholders may have come to believe that they had not realized the advantages they had anticipated as the result of the sale, that any proceedings were taken to challenge the validity of the decree; and it was then that the stockholders began, for the first time subsequent to their arrangements made with Garrison—on March 29, 1876—to charge the directors and counsel of the company with having been recreant to its interests; and then they sought to procure the authority to represent the corporation itself, in order to solicit the Court to set aside the decree. Under the state of facts as already disclosed, the officers and counsel of the company had certainly only done what it was their duty to do, in acquiescing in the express wishes of the parties who were most directly interested in the affairs of the corporation. Having done that, it would have been an act of bad faith to the Court for them to have allowed to these stockholders the use of the name of the corporation, for setting aside a decree made by the Court, which had been entered by their consent, at their request, and under the circumstances made apparent of record. If an attorney enrolled in this Court should, for the accomplishment of any purpose, come before it declaring that a judgment entered by his consent was without authority from his client, and the statement should be untrue, that fact when exposed would certainly subject him to a severe reprimand, if not to severer penalties.

13.

On September 6th, 1876, a sale was made under the terms of the decree which had been rendered three months previously. On Sept. 18, 1876 (K. Rec., 55), the complainant Ketchum filed a motion for the confirmation of the sale.

On September 19th (K. Rec., 56) the committee of the stockholders filed a motion for leave to intervene in the Ketchum case, and on September 22d, filed an amended motion (K. Rec., 56), the purpose of the intervention, as expressed, being to set aside the decree and sale and for liberty to answer, demur, plead or appeal in the case as they might desire.

This motion was (63) signed by Glover & Shepley as solicitors and verified (64) by Cowdrey and Cutting; and it sought to revive the same issues that had been previously raised by the complaints that had been filed in the Cowdrey suit and by the cross-bills in the Ketchum suit.

On October 3d (64) the Court, after full argument, declined to grant the motion.

The committee asked for an appeal from the action of the Court, which was refused. Thereupon they applied to this Court, and obtained a rule on the Judges of the Circuit Court, to show cause why an appeal should not be allowed. In response to that writ Dillon and Treat, J. J., made their return (K. Rec., 166 to 173); which it is submitted contains a *judicial declaration of facts* upon their part, decisive of the present controversy.

On Oct. 6, the sale was confirmed by the Court.

14.

On December 14, 1876 (K. Rec., 77), an adjourned meeting of the stockholders of the Pacific Railroad was held in the city of St. Louis. That meeting

was an adjournment of the annual meeting which had been held on March 27 of the same year. At this adjourned meeting it was resolved by the stockholders:

"That for the protection of the interests of the said Pacific Railroad and its stockholders, Robert L. Cutting, Jr., George R. Fearing, David Ranken, Jr., Peter Marie, and N. A. Cowdrey, or a majority of them, be and they are hereby appointed a special committee and the agents of said Pacific Railroad and its stockholders, with full power and authority to commence, prosecute, and defend all and each of any suits at law or in equity as they or a majority of them shall think for the interest of the said Pacific Railroad or of its stockholders should be prosecuted or defended, including the right to take appeals, bring a writ of error, or to make motions in or for a review of any suit heretofore commenced against said Pacific Railroad. To this end the Pacific Railroad hereby authorize and empower said committee or majority of them to employ and discharge counsel, attorneys, or solicitors; to use the corporate name of said Pacific Railroad for the purpose above named, in such manner and form as they or a majority of them desire, in all places and in all courts, without hindrance or molestation from individual directors or any other officers of said Pacific Railroad."

The stockholders by resolution also revoked any authority that had heretofore been given by the directors of the Pacific Railroad, authorizing the use of the name of that corporation; removed James Baker from the office of attorney of the railroad, and revoked all authority on his part to further represent it; and appointed Glover & Shepley as its attorneys, with full power to represent them in any subsequent proceedings that might be taken. Under the authority of this resolution, the Pacific Railroad applied for and obtained an allowance of an appeal of the Ketchum case to the Supreme Court of the United States, on February 1, 1877.

The proceedings of this stockholders' meeting of December 14, 1876, were regarded by Mr. Justice MILLER (K. Rec., 77), who granted the Ketchum appeal, as being sufficient to authorize the stockholders to take an appeal in the name of the corporation.

The Supreme Court, in rendering the decision on appeal, said (11 Otto, 297):

"Although this appeal may have been instigated by the stockholders in opposition to the wishes of the directors, it is still the appeal of the company, which was one of the parties to the agreement, and must be treated accordingly."

It follows, then, that the acts of the meeting were corporate acts, binding upon both the company and its stockholders; and the *company then and there recognized the same counsel and committee who had all along since the institution of the Ketchum suit been acting for the stockholders, and must also be considered to have authorized the suit which was subsequently instituted by the committee against Garrison.*

15.

At the annual election of the Pacific Railroad, held in March, 1877, the stockholders obtained (K. Rec., 132) full control of the corporate organization, and (K. Rec., 138) Robert L. Cutting, Jr., was elected president, and Cutting, Marie and Cowdrey were made directors; and Glover and Shepley were appointed counsel for the company, and their previous acts were approved.

16.

On June 26, 1880 the present suit was instituted, being ~~five~~ three years after the rendition of the decree, four years and eight months after the confirmation of the sale, and four years and four months after the stockholders had received a judicial recognition (K. Rec., 77) of their right to use the name of the corporation for the redress of any of their alleged grievances.

VIII.

THE CONSENT GIVEN TO THE DECREE OF FORECLOSURE IN THE KETCHUM SUIT, BARS THE COMPLAINANT FROM RELIEF IN THIS CASE.

It has already been decided by this Court that the decree of foreclosure in the Ketchum case was, *in fact*, a decree rendered by the consent of the Pacific Railroad, represented by its corporate officers, and that this consent was (11 Otto, 296) "equivalent to an admission by the company, on the record, that the facts existed on which the decree rests." It is now made manifest, that the decree in question was rendered, not only by the consent of the corporation, but also by the consent of the constituent interests represented by it.

The decree was in fact assented to by the corporation, acting through its Board of Directors, its president, its secretary, and its authorized counsel, and authenticated by its corporate seal. It was assented to by the stockholders of the company, acting through their authorized committee and accredited counsel. It was assented to by the company in its corporate capacity, and by the stockholders of the company, in a separate but organized capacity. And then, nearly two years after the decree had been rendered, the stockholders again declared their consent, by demanding compensation for the consent they had given, and without which, as they say, "the decree would not have been rendered."

But, suppose that it shall still be contended that the consent of the Pacific Railroad, through its corporate officers and counsel, was collusive with, or inspired by, the bondholders; what can that pretense avail the complainant in this case, as long as it appears that the stockholders themselves either

consented to or acquiesced in the decree? The concurrence of the stockholders in what was done must certainly purge the act of the corporate officers *from being wrongful as to them*. The Pacific Railroad may say: "The consent of the stockholders was not my consent." The stockholders may say: "The consent of the Pacific Railroad, given through its corporate officers and counsel, was not our consent." But when this amiable altercation of words is ended, the fact still remains manifest, that the consent at last was that of all parties in interest.

If the Pacific Railroad is to be treated as an independent entity, whose functions begin and end within itself, and in the performance of which no person or other corporation has any interest or control, then it must be conceded that it could not come into a court of equity to be relieved against wrongful or fraudulent transactions in which it confessed *it* had knowingly and designedly participated, and in which it had been the principal actor. If the Pacific Railroad can maintain any suit at all like the present one, or of a kindred character, it must be solely upon the ground that it and its corporate officers held a representative or trust capacity, and that, notwithstanding anything it may have done wrongfully through its officers, it still has the right itself to seek relief, in view of the fact that its stockholders are (using the language of the decisions) "the real parties in interest." But, if the real parties in interest have deliberately, and with knowledge of all the facts affecting the transaction, consented to the act done, where lies the grievance, and who can complain? Suppose the company had refused to institute the present suit, and that the stockholders, severally or collectively, should come into court with a bill of complaint, containing substantially the same averments as the present bill, but further averring that, with knowledge of all

the facts sought to be controverted, they had assented to the decree in manner and form as it was rendered by the Court, would not their bill of complaint be summarily dismissed? Can they accomplish by indirect means what would be a manifest perversion of justice if obtained in a direct proceeding instituted in their own behalf? The rights of the trustees cannot contravene or exceed the rights of the beneficiaries in the trust which they represent.

The principles above suggested are too well established, and too familiar to the Court, to require any citation of authorities in their support. The decree in the case of *Ketchum vs. The Pacific Railroad* was to all intents and purposes *the act and procurement of both the trustees and beneficiaries of the Pacific Railroad.*

All subsequent purchasers of the stock of the Pacific Railroad are bound by the acquiescence given to the decree by the stockholders who then owned the stock. And even though only a portion of the stockholders had consented to, or acquiesed in, the decree, no bill can be matained in behalf of *all* the stockholders, which would include those who had sanctioned the act sought to be restrained or impeached.

Ffoocks v. Railway Co., 19 Eng. L. and Eq., 7, 12, 13.

It is not necessary to show the acquiescence of each individual stockholder. It is enough to show circumstances, that are reasonably calculated to satisfy the Court that the thing about to be done came to the knowledge of all, who, having full opportunity and means of inquiry, chose to inquire.

Green's Brices Ultra Vires, (2d Ed.), pp. 549, 557-8, 584.

IX.

THE COMPLAINANT IS PRECLUDED FROM INSTITUTING THE PRESENT PROCEEDING BY REASON OF NEGLIGENCE AND LAPSE OF TIME.

It appears that the income bonds and improvement bonds in substitution for which the third mortgage bonds were subsequently issued, were made by the Pacific Railroad, and delivered to the Atlantic and Pacific Railroad, its lessee, respectively, on August 27, 1872, and December 11, 1874. Both issues of these bonds were made and issued, as the apparent valid obligations of the Pacific Railroad, five years and six months prior to the institution of the present suit. The third mortgage bonds were made July 10, 1875, under an authorization obtained from the stockholders, and made four years, eleven months and fifteen days before the institution of the present suit.

The bill of complaint in this case does not aver that the stockholders were ignorant, *at the time*, of the fact of the making and issuing of these different series of bonds, or of the alleged frauds connected therewith; and there is no pretence that there was any secrecy practised in respect to their being issued.

The validity of the bonds was admitted by the Pacific Railroad, in its answer spread upon the records in the Ketchum case, four months before the decree was rendered. The proceedings and acts of the stockholders, and their committee and counsel, already detailed, show that the stockholders, during the pendency of the Ketchum suit, *knew every fact affecting the validity of the third mortgage bonds*, as well as the alleged disposition of the officers and counsel of the company in regard to the defense of

the foreclosure proceedings, just as well and to the some extent as is disclosed by the bill of complaint in the present case.

It is also apparent, as a fact which is not susceptible of being controverted, that the stockholders, in their several and collective capacity, as such, were allowed the largest degree of latitude by the Court to contest the validity of the mortgage sought to be foreclosed, and to resist the foreclosure proceedings, either by separate suits or by intervention in the case itself; and whereby, even if they were not allowed to act in the name of the company, they were permitted to be substituted to all, or even greater rights than the corporation itself could have had in making a defense to the case. They, by in part availing themselves of the privilege granted by the Court, and in part threatening to further avail themselves of it, became the *absolute masters of the litigation, so far as regarded the defence of the suit.* Notwithstanding these facts, all the stockholders, except Akers and the County of St. Louis, from the time that the agreement was made with Garrison, on March 29th, 1876, took no active steps to resist the foreclosure; and, on the other hand, *though represented by counsel, who was in Court at the very time the decree was rendered,* no objection or protest was raised against its being entered; but, on the contrary, he remained "silent and passive," at a time when a single word from him would have remitted his clients to the right of making every possible defence that existed or could be raised against the decree of foreclosure.

The complaining stockholders assumed the control of, and the right to represent the corporation itself, on December 14, 1876—three years and a half before the institution of this suit—and could at that time immediately have instituted any action its managers might have deemed desirable. The pendency of

the Ketchum appeal cannot aid the complainant upon the question of negligence, for that appeal was founded upon errors of record; and the right of instituting an independent suit, based upon facts extrinsic to the record of that case, has existed all along, just as much as it does at the present time. In the meantime, it appears (Rec., 17, and K. Rec., 154, 155, 157) that a large portion of the interests represented by the original owners of the property, has been sold to persons who in no wise participated in the original purchase under the foreclosure sale, and who it is not claimed had knowledge of anything impeaching the sale, other than the fact of the pendency of the appeal.

Leaving out for the present the fact of the actual consent or acquiescence given by the stockholders to the decree, how do both they and the corporation, through which they are now prosecuting the suit, stand in a court of equity on the question of diligence? It has already been attempted to be shown, that the Pacific Railroad, in this suit, if remitted to the same rights, must also be subject to the same disabilities as the stockholders, in whose behalf, as the real parties in interest, the suit must be sustained, if sustained at all.

It would seem that the same principles ought to apply, in determining the sufficiency of an original bill to set aside a decree on the ground of fraud, as are employed in determining the question whether leave should be given to file a bill of review to set aside a decree on the same ground.

It is an accepted rule of chancery procedure, that leave of Court to file a bill of review, upon the discovery of new matter, will not be granted except upon an affidavit that the new matter relied upon could not be produced or used by the party claiming the benefit of it, in the original case; and the matter must not only be new, and discovered subse-

quent to the rendition of the decree, but it must be such as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence, that destroys the title to the relief.

Story's Eq. Pl., Secs. 412–414.

In *Foster vs. Wood, 6 Johns. Ch., 87*, the Chancellor said:

"The rule is that chancery will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment *was ignorant of the fact in question pending the suit, or it could not have been received as a defense* or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, *unmixed with negligence on his part.*"

In *Kibbe vs. Benson, 17 Wall., 627*, Mr. Justice HUNT said:

"The cases in which equity will interfere to relieve against a judgment at law are reasonably well settled.

"First: it will not relieve against a judgment at law on the ground of its being contrary to equity, *unless the defendant was ignorant of the facts creating such equity pending the trial, or it could have not been received as a defense.* Second: *if the party could have defended the suit, but allowed judgment to go by his own neglect*, he cannot have relief in equity for matters he might have availed himself of at law."

To the same effect are

Insurance Co. vs. Bangs, 103 U. S., 782.
Lansing vs. Eddy, 1 Johns. Ch., 49.
Barker vs. Elkins, 1 Johns. Ch., 465.
Norton vs. Wood, 22 Wend., 520.

In *United States vs. Throckmorton, 98 U. S., 61*, Mr. Justice MILLER announces the same principles above set forth, and cites (p. 67) with approval the statement of Lord Redesdale:

"I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed, over which the court of law had full jurisdiction."

And then proceeds to say:

"The rule must apply with equal force to a bill to set aside a decree in equity after it has become final, where the object is to retry a matter which was in issue in the first case, and was matter of actual contest;" or (p. 68) "was so in issue that it might have been tried."

In their return in the *ex parte Cutting* proceeding filed in this Court November 20, 1876, DILLON and TREAT, JJ., after disclosing the facts, said (K. Rec., 167):

"The petitioners" (the committee of the stockholders) "*were guilty of laches, which should deprive them at that late day,* of any supposed right to intervene in order to contest the original merits of the plaintiffs' right for a foreclosure, as decreed at the preceding term."

See also

Kent vs. Quicksilver Mining Co., 78 N. Y., 184 to 190.

If there has been any misconduct in the management of the affairs of the Pacific Railroad, the stockholders and directors now stand before the Court *in pari delicto*,—the one in performing, and the other in sanctioning acts as those of the corporate body which they collectively compose.

Scott vs. Depeyster, 1 Edw. Ch., 536.

Neither the stockholders nor directors have the right to accuse each other for the transactions complained of, by reason of their having eventuated in loss to the parties concerned.

Ang. & Ames on Corp., Sec. 312, p. 326.

Much less have they the right to endeavor to make amends for such losses by making a raid upon parties who have acquired valuable interests upon the faith of their mutual authorization of the decree which was rendered, and which is now sought to be assailed.

* Question of laches is raised by demurrer.
Lansdale v. Smith, 106 U.S. 391
Goddard v. Kennedy 99 U.S. 201 211

It can avail the stockholders nothing to claim that they gave no actual consent of record to the decree, at the time it was rendered in Court. If Akers and the County of St. Louis did not in fact represent those stockholders, then, still the stockholders were in Court by counsel at the time the decree was entered, and had power to avert its being rendered at that time, and until such time as any issues they might raise in the case could be tried. Under such circumstances, *silence* must be construed as giving *consent*.

"Where a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain vs. Seamens, 9 Wall., 274.
Hotel Co. vs. Wade, 7 Otto, 23.

X.

THE FACT THAT THE PROPERTY WAS PURCHASED IN THE NAME OF JAMES BAKER AFFORDS THE COMPLAINANT NO GROUND FOR RELIEF.

As already disclosed, whatever Baker did in the matter of consenting to the decree of foreclosure was by the express authority or sanction of the corporation, its officers and stockholders. There is nothing to taint his professional connection with that part of the case. If, as the bill avers, he was paid for his services by the new company, that fact even does not challenge his integrity. He was entitled to be paid by some one for any services he

may have rendered subsequent to the time the property passed into the hands of the receivers, and subsequent to which he had received no compensation. The new company, by the very terms of the arrangement between Garrison and the stockholders, was deputed to pay all the expenses of the foreclosure litigation; and even if Garrison did not purchase the property, so as to be amenable to the terms of the agreement, it would still seem that there can be nothing to cavil at, if the new company still saw fit to recognize Baker's claim for compensation. And in view of the fact that Baker was, from the time the foreclosure sale took place, being studiously and continuously calumniated, in and out of Court, by the very parties at whose instance and request he had acted in consenting to the decree, it would seem no more than fair and just that he should have been liberally compensated.

If, however, our view of the case is correct, Baker's action as solicitor of the company, up to and at the time of the rendering of the decree, is free from any objection that can now be raised by the company or its stockholders. So the only question remaining as to his connection with the case, which can be the subject of any controversy, is whether he had the right to purchase the property at the foreclosure sale, it being admitted that he was at that time still the counsel of the company.

In the first place, it is to be observed that the stockholders of the corporation have, through their authorized committee and counsel, *actually ratified the sale to Baker, and its attendant facts and circumstances, in the suit which they instituted against Garrison; for it is upon the very sale made to Baker that they based their principal cause of action in that case.*

But the record of the Ketchum case shows, and the bill of complaint in this case admits, that Baker's

purchase was really in behalf of the bondholders, and that they alone participated in the purchase. This Court has already declared, on two separate occasions, that the sale to Baker as representing the bondholders was in itself unobjectionable. On a motion made in this Court by the present complainant, at the October Term, 1877, Chief Justice WAITE said (5 Otto, 3):

"Although the sale was in form to the attorney of the appellant, it was in reality to the bondholders, in whose interest the foreclosure was had."

In the decision of the Ketchum case, on appeal, the Chief Justice, again rendering the opinion of the Court, says (101 U. S., 299):

"This leaves only the question arising on the confirmation of the sale. The only objection here insisted on, is that Baker, the purchaser, was the solicitor of the appellant company. His purchase, although nominally in his own name, was actually by and for the bondholders. He was used to hold the title until the bondholders could organize and take it. While purchases at judicial sales in the name of the solicitors and attorneys of parties whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to the parties they represent. Here, the company whom Baker represented as solicitor confessed its inability to pay the debt it owed, and consented that the property held as security be sold. In the decree, which it assented to, special provision was made for a purchase by or for the bondholders. We can see no harm which will result from permitting the solicitor of the company to take the title for the bondholders under such a purchase. No complaint was made below of actual wrong. The only objection was that such a purchase was inconsistent with the duties of the solicitor. There was no speculation by the solicitor in the purchase. All he did was to hold the title until the real purchasers were in a condition to take it themselves. If there had been any proof of collusion, or improper conduct on the part of the solicitor, resulting in wrong to the company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of the solicitor of one whose property is sold is necessarily, in and of itself, invalid. We think it is not. It will be scrutinized closely, but, until impeached, must stand. Slight circumstances may impeach it, but it is not under all circumstances invalid."

Under the bill of complaint which we are now demurring to, the case stands, so far as regards Baker's

attitude to the purchase at the sale, precisely as it did upon the record, which has been passed upon by this Court. The bill of complaint does not charge that there was any effort made by Baker, either prior to or at the sale, to suppress bidding, to keep away other or probable purchasers, or that in fact the property sold for any less than it would if his name had not been used to hold the title for the benefit of the purchasing bondholders. Pursuing the language of Chief Justice WAITE above quoted, there is no averment in the bill of complaint that Baker's purchase of the property resulted in any injustice to the parties he represented, or any actual wrong to them; or that there was any speculation by Baker in the purchase, or that there was any collusion or improper conduct on his part in the act of permitting the property to be placed in his name, resulting in wrong to the company.

In this, as in all other transactions connected with the Ketchum case, Baker stands relieved from any professional bad faith to either the company or its stockholders, or, we may add, to the Court, in his conduct of the case.

The complainant is equally precluded by lapse of time from raising this question, as they are from raising others already discussed.

The right of a corporation to avoid a sale of its property, by reason of the fiduciary relations of the purchaser, must be exercised within a reasonable time; and what is a reasonable time, in any particular case, must be arrived at by a consideration of all its elements which affect that question.

Twin Lick Co. vs. Marbury, 1 Otto, 587, 591.

Kitchen vs. Railroad Co., 69 Mo., 264.

XI.

AS TO AVERMENTS REGARDING THE POPLAR-STREET TRACK.

The bill of complaint (p. 3) avers that there were $750,000 of Atlantic and Pacific Railroad equipment bonds, also a tract of land at Kansas City not covered by the mortgage, but which was wrongfully "handed over to the purchasers at said sale." An inspection of the decree, or other parts of the record, does not show, as far as we can ascertain, that any such property was passed over to the purchaser under any order of the Court. And if it was, then the complainant's redress, if it has been wronged in the manner asserted, must be through other means than by an assault upon the decree, which contains no reference to the property above referred to.

But it is also averred in the bill (p. 3) that the decree and master's deed embraced property which was fraudulently, and without the knowledge of the complainant, interpolated in the decree, and expressed in the clause "including, among other things, the track on Poplar Street and the Levee, in the City of St. Louis, commonly known as the Poplar street track."

But it is not averred that this clause in the decree *was at the time unknown to the stockholders or to their committee and counsel.*

By referring to the third mortgage, and the bill of complaint and the decree in the Ketchum case, it will be found that the clause above cited did not exist in either the third mortgage or the bill of complaint, but was for the first time inserted in the decree as being comprehended among the various "appurtenances" of the Pacific Railroad; and the

same description, of course, passed into the master's deed. We claim that there is nothing in this averment of the present bill of complaint that affords any substantial grounds of relief to the complainant, and for the following reasons:

FIRST. Because the Poplar-street track was a mere spur of the Pacific Railroad, or, in the language of the bill, an "avenue or railroad by which traffic can be taken from the freight depots in St. Louis to the Mississippi River;" and as such it would have passed, without further description, as an appurtenance or incident of the main line of the Pacific Railroad. In *Seymour vs. Railroad Company*, 25 Barb., 284, it was held, where a branch track 7,132 feet long was built in the Village of Towanda, connecting the main line with Lake Erie, that though it was built subsequent to the making of the mortgage, it still passed under the mortgage as (p. 310) an *incident* of the main line. The Supreme Court of the State of Missouri (*Atlantic & Pacific R. Co. vs. City of St. Louis*, 66 Mo., 254, 255) have declared that this Poplar-Street track was a mere branch of the main line, built through Poplar street to the Levee under the authority of the charter of the Pacific Railroad.

SECOND. As it appears that the clause in question appeared in the decree, and not in the bill of complaint in the Ketchum case, the error, if it was one, *was apparent in the record of that case*, and was a proper subject to have been then and there considered and decided; so that the affirmance of the decree by this Court leaves that question no longer open.

THIRD. The record proceedings already detailed, show that it was *this very decree, in substance and form as rendered, that was assented to by the representatives of the corporation and its stockholders;* and the bill in this case does not aver that the clause

was unknown at the time to the stockholders or their committee.

The decree is presumed to have been rendered by consent with a view to existing facts within the knowledge of the parties, and such being the fact, it is immaterial whether the decree was expressly authorized by the pleadings.

Thompson vs. Maxwell, 5 Otto, 398.

FOURTH. The stockholders, through their committee, by instituting suit against Garrison *based upon the decree itself, thereby confirmed the decree in manner and form as it had been previously rendered.*

FIFTH. If the averment of the bill as to the Poplar street track is made simply as an incident of fraud bearing upon the general question of the validity of the decree, and not as a substantial ground of relief within itself, then it must fall, with all the other attendant circumstances of like character, under the conclusive effect of the decree, which was made by the deliberate consent of all parties interested in the corporation.

XII.

THE FACT THAT INTERESTS OF INNOCENT PARTIES HAVE ACCRUED UPON THE FAITH OF THE DECREE AND SALE, PRECLUDES THE COMPLAINANT FROM INVOKING ANY EQUITABLE CLAIM TO SET THEM ASIDE.

In this case, the railroad was acquired by a corporation whose stock and bonds have been sold in the market; and presumably have in large part passed

into the hands of innocent purchasers. (See bill, p. 17, K. Rec., 154, 155, 157).

> After a consent decree is carried out, it is regarded as final, and estops the parties and privies from calling them in question, to the detriment of third parties who have acquired an interest under the decree or in any sale had thereunder.
>
> *Wadhams vs. Gay, 73 Ill., 415, 422.*

Even a reversal of a decree, for error, will not affect the title of a purchaser of property acquired at a sale had under the terms of the decree.

Whiting vs. Bank, 13 Pet., 15.
Bronson vs. Railroad Company, 2 Black, 524, 530.
Gray vs. Brignardello, 1 Wall., 627, 634.
Sage vs. Railroad Company, 96 U. S., 714.

MELVILLE C. DAY,
Counsel for the Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

PACIFIC RAILROAD,

Appellant,

No. 346. *vs.*

MISSOURI PACIFIC RAILWAY COMPANY et als.,

Appellees.

ARGUMENT

FOR THE

MISSOURI PACIFIC RAILWAY COMPANY,

Appellee.

DILLON & SWAYNE,

For the Appellee Company.

NEW YORK:
C. G. BURGOYNE, PRINTER, 57, 59 & 61 PARK STREET.
1884.

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PACIFIC RAILROAD
Appellant,

AGAINST

MISSOURI PACIFIC RAILWAY COMPANY ET AL.

Argument of Dillon & Swayne for the Missouri Pacific Railway Company (Appellee).

Statement of the Case.

The bill of complaint in this case was dismissed upon demurrer. The bill consists of (1) a series of allegations of fraud in the creation and subsequent foreclosure of a railway mortgage debt, interwoven with various recitals as to the proceedings in foreclosure; (2) a series of exhibits mainly taken from the record of that foreclosure; and (3), by way of reference, the entire foreclosure record, including various proceedings in this Court subsequent to the appeal. To these last proceedings the bill makes frequent and specific reference.

The Circuit Court held that the recitals, exhibits and record disclosed matter which entitled the defendants to have the charges treated as null, and to have the bill dismissed.

The following are the charges of fraud made by the bill, and which the Court held had been considered and disregarded by the stockholders pending the foreclosure:

Prior to November, 1875, the appellant, Railway Company, being under control of the defendants, or some of them, issued, under that duress, various pretended obligations, and particularly $4,000,000 in "third mortgage bonds."

In June, 1876, a decree of foreclosure and sale of the property of the appellant in behalf of these bonds, at the suit of George E. Ketchum, was entered in the Circuit Court in which this suit was commenced.

The appellant was still under the same control as when the pretended obligations were put forth.

The foreclosure was not resisted, but was fraudulently helped by the then officers of the appellant.

The decree also was fraudulently made to include by express description important property not covered by the mortgage.

The foreclosure was consummated by a sale made under the decree, which was afterward duly confirmed.

The purchaser was James Baker, one of the defendants. He has since sold to the Missouri Pacific Railway Company, also one of the defendants.

This company was composed of persons who were holders of the said "third mortgage bonds," and took them with knowledge of the fraud by which they were affected. It has little or no cash capital, and has issued to the persons who formerly held "third mortgage bonds" its own bonds in lieu thereof. The company still holds the railroad and property which the appellant formerly held.

THE BILL THEREUPON ASKS TO SET ASIDE THE DECREE FOR FRAUD IN OBTAINING IT, AND FOR AN ACCOUNT AND RESTORATION.

The defendants demurred on the ground that there was no averment of want of timely notice of the fraud alleged. Also because by the averments of the bill and by the record above mentioned, it was disclosed affirmatively that plaintiff was estopped from making this complaint, the same charges of fraud having been fully considered by the stockholders of plaintiff and abandoned by them pending the foreclosure. Also because the Court had not jurisdiction of the cause, several of the defendants, including the defendant railway company, the present owner of the property, being citizens of the same State with plaintiff in error. Also because of limitation and laches.

The bill exhibits the complaint and decree in the suit of Ketchum, above mentioned, and the trust deed foreclosed in that suit. It also "prays liberty to refer to the files and records of said United States Circuit Court" in that case, and also to the "Record U. S. Supreme Court, No. 242, p. 5, and motion to dismiss, p. 16," in the same case.

Other parts of the same record are separately referred to.

This "Supreme Court Record" was the result of an appeal taken by the appellant from the decree of foreclosure and sale. The sale was confirmed October 6th, 1876. The appeal was allowed February 4th, 1877.

The Supreme Court record, in the foreclosure case, *inter alia*, embraces:

1. Proceedings on an application by Cutting *et. al.*, holders of shares in appellant's capital stock, for a mandamus requiring the Circuit Court to admit them as parties to the suit. The opinion of this Court is reported in 94 U. S., p. 14.

2. Proceedings on an application by this plaintiff for the appointment of a receiver of the Pacific Railroad. The opinion of this Court is reported in 95 U. S., p. 1.

3. Proceedings relating strictly to the appeal. The opinion of this Court is reported in 101 U. S., p. 289.

All of these were, of course, before the Circuit Court, and are part of the record of the present case.

Opinion of the Circuit Court.

The Court found that the bill contained no averment of want of timely notice, and due diligence on plaintiff's part, as the demurrer had suggested, and that their absence was material.

On the ground of estoppel and laches, the demurrer was expressly sustained. The Court found from the recitals of the bill, the exhibits and the record, to which reference was prayed, as follows:

"That the stockholders, as a body, were advised of the foreclosure suit, and took action looking to its defense, and that they did not rely upon the officers of the corporation, but distrusted and antagonized them, is clear from the allegations of the forty-fifth count of the bill, by which it is charged that the stockholders, in writing, requested the

directors to resign, that others might be appointed in their place who would properly attend to the duties of their office; also that the stockholders requested said directors to employ counsel other than James Baker to defend the suit of Ketchum.

"It further appears that a meeting of stockholders held March 27, 1876, at St. Louis, several months before the rendition of the decree of foreclosure, a resolution was adopted requesting the directors to employ counsel to aid in the defense of the foreclosure suit. This meeting was held while the suit was pending, and in the city where the Court was sitting (See Record Ketchum Case, page 50).

"It was not enough for the stockholders to content themselves with the passage of this resolution, especially as the bill avers that it was disregarded. They were bound to go forward with due diligence, in the assertion of their rights, which they knew were imperilled, and we see enough in the record to satisfy us that they would have done so but for the fact that they, or their managing committee, to whom they intrusted their interests, afterwards became satisfied with and assented to the decree.

"It is very apparent that the stockholders were dissatisfied with the action of the directors and attorney of the company in the defence of the foreclosure suit. They were therefore put upon inquiry and bound to do whatever it was in their power to do to protect their interests. Any individual stockholder was at liberty to apply to the Court for leave to intervene and defend. The stockholders were parties in interest, and upon representing that fact to the Court, and showing that the officers were not defending in good faith, they would without doubt, have been allowed to defend. That the Court in that case recognized the propriety of this is clear from the fact that several stockholders asked and readily obtained leave to appear and defend.

* * * * * * *

"We have already seen that the stockholders were aware of the suit; that their attention was directed to it; that they distrusted the officers of the corporation and took steps looking to the assertion of their rights, It is also apparent from the record

of the proceedings in the Ketchum case that they knew the facts now set up by way of defense. Akers, one of their number, and also the county of St. Louis, on behalf of themselves and such other stockholders as might join therein, appeared in said suit, and by leave of Court answered and filed cross-bills, setting forth in substance the principal facts now relied upon."

* * * * * * *

"Another consideration has great weight with us. The stockholders of the Pacific Railroad, having knowledge of all the facts, and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either during a period of four years. In the meantime the decree had been fully executed; the property had been sold and the sale had been confirmed; the purchaser at the sale had conveyed to a new corporation, which had issued new stock, and executed negotiable bonds for large sums secured by mortgage upon the property. The stock and bonds of the new company have gone into the market. Whether it is all held by innocent purchasers, we are, of course, in the absence of proof, unable to say, but the facts and circumstances to which we have adverted certainly furnish strong reasons for holding that the stockholders and the corporation have been guilty of laches."

The question of jurisdiction was not disposed of by the Court. It depends upon whether a bill against transferees, to set aside for fraud the decree through which they derive title is an original bill, in effect a new cause, and so within the constitutional limitation as to citizenship of parties. Having looked into the record and observed that the bill by its own references and recitals plainly stated itself out of Court, the Court dismissed it without reference to the disputed continuity of the proceeding.

Wiih regard to the alleged fraud which is the staple of the bill of complaint in this case that the appellant's officers in 1875 and 1876 were aiding the collection of a pretended debt, the Circuit Court found that the same charges were made to the stockholders as a body as early as March 27th, 1876, months before the decree, and in ample season to prevent it from being entered if they had thought the charge worth being pressed.

We proceed to discuss what we conceive to be the principal questions in the case, avoiding, as far as practicable, the ground which has been so well covered in the brief of the associate counsel.

ARGUMENT.

I.

This is a new and original and not an auxiliary or supplemental bill, and as the complainant and the main defendant are citizens of the same State, the Circuit Court had no jurisdiction.

But if the appellant is right in his contention (Appellant's Brief, p. 13) that this is an ORIGINAL BILL, impeaching the foreclosure decree for fraud, in the NATURE OF A BILL OF REVIEW" (Story Eq. Pl., Sec. 426), then any right to relief is barred by limitation and laches.

JURISDICTION, LIMITATION AND LACHES.

It is important in respect of all the questions arising in this case, and particularly as respects the questions of *jurisdiction and laches*, that the precise nature of the substantial controversy made by the bill be clearly defined and ascertained.

This suit is brought, as we have seen, by the old Pacific Railroad in its corporate name against the complainants, in the foreclosure suit, Ketchum, C. K. Garrison, Seligman and Pierce, and the trustees in the income, improvement and third mortgages and others, including the new company, organized since the foreclosure sale, by the name of the *Missouri Pacific Railway Company*.

The foreclosure decree on the third mortgage was rendered June 6, 1876. The foreclosure sale to Baker, as trustee for the third mortgage bondholders, was made September 6, 1876, and confirmed by the Court October 6, 1876.

Ketchum Record, p. 55.

On October 3, 1876, the Court refused to set aside the sale at the instance of Cowdrey *et al.* (Ketchum Record, p. 64) and its action in this respect was affirmed in *Ex parte Cutting*, 94 U. S.

On October 24, 1876, the Master conveyed to Baker.

Ketchum Record, p. 68, for copy of deed.

Immediately afterwards Baker conveyed to the present company, viz., the Missouri Pacific Railway Company (*Bill in this case, p. 14*), which company, "on the 1st day of November, 1876, without any right to do so (why?), executed and delivered to the National Trust Company a mortgage of the property of the Pacific Railway to recover $4,500,000, &c."

Record in this suit, p. 14.

The prayer of the bill is to set aside the foreclosure decree, for an account, and *to redeem the property* from the present company.

Record, pp. 31, 32.

This is a bill to redeem the property from the mortgage and sale as against the new company, and everything else is incidental to that object.

It appears by the bill that the *legal title* to the railroad and property in dispute has been since 1876

in the present company, the Missouri Pacific Railway Company.

It is the real, and indeed only substantial, party in interest.

Test: If a decree should be rendered, as prayed by the bill of complaint, the new company and its shareholders and creditors would be the only sufferers. If the decree and sale thereunder are void or shall be set aside, the new company has no recourse on the plaintiff's in the foreclosure suit or the third mortgage bondholders.

The legal effect of a sale to a purchaser under a void foreclosure decree, or under a sale which is set aside, is that such purchaser is by subrogation the equitable assignee of the foreclosed mortgage and becomes thus a creditor of the mortgagor and entitled to the redemption money.

Broost vs. Brock, 10 Wallace, 519:

The Court says (p. 534):

"We express no opinion on that subject. It is enough that an irregular or a void judicial sale, made at the instance of the mortgagee, passes to the purchaser all the right the mortgagee, as such, had. For this, authority is hardly needed."

See also

Jones on Mortgages, section 813, and cases cited.

It will be remembered that the present company was not a party to the foreclosure suit. *It* did not buy under the foreclosure decree. *It* did not pay for the property in the bonds secured by the mortgage foreclosed.

It paid for the property in its own bonds, and is thus a purchaser for value.

The decree here sought is not only to set aside the foreclosure decree and sale thereunder, but the title of the present company derived from its purchase of the purchasers at the foreclosure sale, and evidenced by a deed from such purchasers.

It is thus manifest that the present company is in reality the *only* defendant in interest in this controversy. The case is essentially different from what it would be if this bill were filed only against parties to the original suit, and if such parties only would be affected by the relief sought.

It is different in two respects:

1st. If the parties to original suit were the only parties to be affected, or the parties chiefly interested, then this suit might be regarded as auxiliary to the foreclosure suit, or a mere continuation of it, and not as a new or original suit, and therefore the jurisdiction of the Circuit Court would attach, *irrespective of the citizenship of the parties*, to the auxiliary or supplemental bill. Not so, however, if the only parties interested or the parties chiefly interested were not parties to the original suit, and acquired title mediately under the decree and sale, prior to the institution of the suit to impeach such decree, sale and title, which is this case.

2d. The present company is admitted in the bill to have the legal title, and it claims an absolute and irredeemable title against the plaintiff and the world, not acquired *pendente lite;* and it is entitled to the fullest benefit of the

salutary doctrines of equity as respects the limitation of suits and the delay and laches of the plaintiff in the institution of this suit.

We therefore maintain that, as against the new Company, this is in effect a bill to redeem from it, and as such is a new and original suit, not a mere incident or continuation of the foreclosure suit, and that, inasmuch as it and the complainant are citizens of the same State, the Circuit Court had no jurisdiction.

See cases cited in Mr. Day's brief, pp. 5–7.

But if in this we are mistaken, and if this is, as the appellant contends (Brief, p. 13), "an original bill in the nature of a bill of review" as stated in Story's Equity Pleadings, Sec. 426, then it is barred because more than two years (the time allowed by statute for appeals and bills of review) had elapsed after the frauds were known and after the complainant corporation had come into the full control of the Cowdrey party; and if not imperatively barred by the two years' limitation, it is barred by the general doctrine of equity as to laches.

This Suit Barred by Limitation.

As against the *original parties* to the foreclosure suit the appellant is probably right in his contention that this is an "original bill *in the nature of a bill of review* to impeach a decree for fraud." Story so describes such a bill.

Story Eq. Pl., Sec. 426, and authorities cited.

Suppose that it is also such a bill as against the new company; the question is within what time must such a bill be brought.

OUR PROPOSITION IS THAT IN ANALOGY TO THE TIME ALLOWED FOR BILLS OF REVIEW TO REVERSE A DECREE,, SUCH A SUIT MUST BE BROUGHT WITHIN TWO YEARS FROM THE ENROLMENT OF THE DECREE, OR, AT THE FURTHEST, WITHIN TWO YEARS AFTER THE DISCOVERY OF THE FRAUD.

This proposition is sustained by authority, and rests upon sound principles.

It is the settled doctrine of this Court that bills of review for *errors apparent of record* must be brought within *two* years; that being the time now allowed for taking an appeal. Rev. Stats., Sec. 1008.

Thomas *vs.* Harvie's Heirs, 10 Wheaton, 146, and cases cited in Mr. DAY'S brief, p. 7.

Bills of review based upon *newly discovered evidence* must for the same reasons be brought at least within two years after the discovery of the new evidence.

On this point Mr. Justice STORY'S opinion is express and clear.

Story, Eq. Pl., Sec. 419: "We have already seen that a bill of review for error apparent on the face of the decree must be brought within the same period, which limits writs of error at law. The question may arise whether the like limitation applies to bills of review upon new discovered facts and evidence. *There can be no doubt that it will be a good bar, that the bill of review is not brought within the period limited for writs of error, after the discovery of the new facts or evidence.* But the point intended to be stated is, whether any bill of review will lie after the lapse of that period from the time of making the decree, although the bill of review is brought within the prescribed period after the discovery of the new facts or evidence. There does not seem to be any decision settling the point; and as the

allowance of a bill of review for new discovered evidence is discretionary with the Court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight with the Court in refusing the application, in connection with the other circumstances."

Story, Eq. Pl., Sec. 419.

The reason for the limitation of bills of review of all kinds is well stated in Thomas vs. Harvie's Heirs, 10 Wheaton, 146, and they apply with equal force to the present bill whatever, may be regarded as its exact nature.

The points there decided are thus stated in Judge CURTIS' head-note:

"There is no statute expressly limiting bills of review, but the courts of the United States are governed in this particular by the analogous limitation of the right of appeal, and, therefore, a bill of review cannot be filed after the lapse of five years from the final decree,—now two years.

"If such a bill can be allowed to be filed, after the expiration of that time, for an error not previously known, the complainant can assign no other error, and if that be not sufficient to reverse the decree the bill must be dismissed."

WASHINGTON, J., delivering the opinion of the Court, thus stated the grounds of its judgment:

"It must be admitted that bills of review are not strictly within any Act of limitations prescribed by Congress; but it is unquestionable that courts of equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts.

* * * * * *

"These principles seem to apply, with peculiar strength, to bills of review in the courts of the United States, from the circumstance that Congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies, by appeal and a bill of review, so apparent that the Court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former. *For, it is obvious that if a bill of review to reverse a decree, on*

the ground of error apparent on its face, may be filed at any period of time beyond the five years limited for an appeal, it will follow that an original decree may, in effect, be brought before the Supreme Court for re-examination after the period prescribed by law for an immediate appeal from such decree, by appealing from the decree of the Circuit Court upon the bill of review. In short, the party complaining of the original decree would in this way be permitted to do indirectly what the Act of Congress has prohibited him from doing directly.

"Whether a bill of review, founded upon matter discovered since the decree, is, in like manner, barred by the lapse of five [now two] years after such decree, is a question which need not be decided in the present case."

Thomas vs. Harvie's Heirs, 10 Wheaton, 146.

Now, suppose the present, as the appellant contends, is not a bill of review strictly, but *an original bill in the nature of a bill of review* to impeach a decree in the same Court for fraud, within what time must it be brought?

The same principles of public policy upon which the two years' statutory limitation for taking appeals and writs of error is based, applies to such a case.

So strongly are titles and rights acquired under judgment or decree of Court upheld, that, as against a purchaser for value, such titles are not affected by a subsequent reversal of the judgment or decree.

"If a judgment is reversed for error, it is a settled principle of the common law, co-eval with its existence, that the defendant shall have restitution only of the money; the purchaser shall hold the property sold; and there are few, if any, States in the Union who have not consecrated this principle by statute."

Mr. Justice BALDWIN delivering the opinion of the Court in Voorhees vs. Bank of the United States, 10 Pet., 475.

Also see,

McGoon vs. Scales, 9 Wall., 23, 31;
Guiteau vs. Wisely, 47 Ill., 433, 436;
Goodwin vs. Mix, 38 Ill., 115, 128;
McLagan vs. Brown, 11 Ill., 519, 523.

If two years from the discovery of the fraud is not the limitation to a bill to impeach a decree for fraud, then there is no known and ascertainable limit.

THAT TWO YEARS FURNISHES THE GENERAL RULE OF LIMITATION in such a case as the present is expressly decided by the Supreme Judicial Court of Massachusetts in

Evans vs. Bacon, 99 Mass., 213.

The head-note states the substance of the decision thus:

"A bill in equity to annul a decree obtained in fraud of plaintiff ought ordinarily, by analogy with the period fixed by statute for suing out of writs as of right, or the filing of petitions for review of judgments in civil actions (Gen. Stats., Chap. 146, Secs. 20, 21), to be filed within one year from his discovery of the fraud."

The case is analogous to the one at bar, and the opinion of the Court is instructive:

"FOSTER, J.: In the view which the Court have taken of this case, it is unnecessary to decide whether the present bill is to be regarded as one to impeach a decree for fraud, which it is said to be filed without leave of Court (Adams, Eq., 419), or as a bill of review, which, when not founded upon error in law apparent on the face of the record, can be filed only upon leave granted. (Elliot vs. Balcom, 11 Gray, 286.)

"The complaint of the plaintiff is, that in the original suit brought by him an entry of 'bill dismissed' was improperly and fraudulently procured by the defendants. This entry was made April 7, 1862. In October, 1864, a petition to have the decree set aside was heard and denied. The present bill was filed February 27, 1867."

* * * * * * * * *

"*It is true there is no Statute of Limitation fixing a precise period of time after which the right to file a bill like the present is barred. But the limitation of a year for writs of review affords a close and forcible analogy.* Plymouth vs. Russell Mills, 7 Allen, 438. No reason is assigned and no excuse offered for a greater delay in the present instance. And, without laying down any inflexible rule, the Court are all of opinion that one year after the discovery of the alleged fraud is a period beyond which the right to file such a bill as the present ought not ordinarily to be allowed; and that the particular facts of this case furnish no reason for enlarging the time. *Bill dismissed.*"

But if we are wrong in supposing that two years from the time when the Cowdrey party came into control is an imperative bar, we earnestly maintain that the bill is barred on the general principles of equity by the LACHES OF THE COMPLAINANT in bringing the suit and the attaching of intermediate rights.

This Suit Barred by Laches.

The foreclosure decree was rendered June 6, 1876; sale thereunder made September 6, 1876, and confirmed October 6, 1876, and title acquired by the new company in November, 1876. This suit was not brought until June 26, 1880.

The Circuit Court sustained the demurrer to the bill in part on the ground that:

"No relief will be granted if the complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the Court pending the original suit," and that "the bill and its exhibits show affirmatively that the present complainant through its stockholders had notice of the foreclosure suit; knowledge of the defense now insisted upon against the third mortgage bonds; and ample opportunity to make that defense."
Record in this Case, p. 93.

The complainant could not amend, and did not ask to amend his bill, because the record of the fore-

closure suit indisputably showed that the present complainant and its stockholders did have such knowledge and opportunity.

Referring to this subject in his brief in this Court (Point VII., p. 16), the appellant's counsel says:

"The knowledge of the complainant with reference to these frauds was not a question in the case.

"The complainant does *not* base its rights to relief on *any theory of ignorance* with regard to the first class of frauds complained of, but *on the theory that it was imprisoned, bound and disabled from acting through the fraud of its officers, who could not be dislodged from their control of the company.*

"The bill does sufficiently state that this condition of foreign, hostile and fraudulent control existed through the suit and long after the decree was entered. (Fols. 10, 50.)

"While this company was in this condition, notice or diligence on the part of the corporation, in learning of the facts alleged in this complaint, was of no avail. The difficulty was deeper. It was a case of usurpation—of foreign control. The corporation was morally and physically deaf and blind and dumb. Its official action was controlled by its adversaries."

The question is thus narrowed by the appellant's counsel to a single point. True, "we knew of the frauds now charged, and had through the right conceded by the company to the stockholders, and through the action of the Court, admitting the stockholders to defend, ample opportunity to make defense; but this is all immaterial because the corporation was "imprisoned, bound, disabled, under usurped and foreign control."

If true, what difference did that make, since the stockholders were without contest, invited and actually allowed to intervene and defend.

But aside from this, what are the facts as shown by the record as to the duress and imprisonment of the complainant and in respect of the rights acquired on the faith of the decree.

This decree was rendered in June, 1876, and the sale was made in September, and the title of the new company acquired in November, 1876.

Within four months after that time, viz.; on the 26th day of March, 1877, at the annual meeting held on that day the alleged duress and imprisonment of the company came to an end, and the Cowdrey party came into the full control, and Cutting was elected president, and Cowdrey *et al*, directors, and Glover & Shepley appointed attorneys of the company.

> Ketchum Record, pp. 138, 139, where official record of the stockholders' meeting of March 26, 1877, is given at length.

At no time prior to November 13, 1879, that is to say, two years and eight months *after* Cowdrey *et al.*, came into undisputed control of the appellant, did Mr. Gould have anything to do with the Pacific Railroad, as stockholder, director or bondholder. The record of the Ketchum case contains the undisputed statement by Mr. Gould on oath, as to the time and circumstances when he purchased the Garrison interest. Mr. Gould on the 7th day of April, 1880, stated on oath as follows:

> "And Jay Gould, for himself, further states that on the 13th day of November, 1879, he purchased 4,005 shares of stock in the Missouri Pacific Railway Company of C. K. Garrison, paying him therefor at the time the full *value thereof in cash; and the said Gould further states that he made the said purchase by himself and for himself, and for no other person, and was and is alone and solely interested therein, and that neither before or at the time of said purchase was he informed, or did he know, or had he*

ever heard, of this appeal, or of any litigation touching the said property, and this deponent made such purchase for value, and wholly without notice of any adverse rights or equities, if any exist, and deponent saith if it should now be decided and held that the title of the present company is defective or redeemable, it would cause infinite confusion and great loss to the stockholders, the lessors, the mortgage creditors, and other creditors of the said Missouri Pacific Railway Company.

He further states that neither said old Pacific Railroad Co. of Mo , nor any one for it, has tendered or offered to pay to the trustee or to the present company, or to any person, the amount necessary to redeem the said mortgage forclosed, or any amount whatever."

Ketchum Record, p. 155.

If there were no such statement of the origination of intermediate rights, in such a property as this the Court would be justified in presuming it.

Now, although this appellant company was enlarged, and recovered its faculties and powers in March, 1877, this bill was not filed until *three years and four months* afterwards, that is to say, not until June 26, 1880.

It is now clearly the rule of the Courts of Equity that the Statute of Limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by way of demurrer as well as by pleas.

Daniell, Ch. Pl. & Pr., page 560.

In Brown vs. County of Buena Vista, 95 U. S., 157, the county filed a bill in equity to set aside a judgment against it on the ground of fraud on the part of Brown in obtaining it. Brown interposed

the defense of laches. Mr. Justice SWAYNE, in delivering the opinion of the Court, says:

"The Statute of Limitations of Iowa of five years, perhaps, does not apply, because the fraud, if it existed, was not known sufficiently early. The statute could only run from the time of the discovery. But a Court of Equity applies the rule of laches according to its own ideas of right and justice. Every case is governed by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be solved by the sound discretion of the Court. Sullivan vs. Portland and Kennebec Railroad Company, 84 U. S., 806."

It is no hardship on the plaintiff to apply the doctrine of laches to the present bill, since it was carefully and deliberately framed to state its case in its full strength; and instead of amending and removing the fatal objections to the bill, pointed in the opinion of the Court on the demurrer, the plaintiff elected to stand on the bill as sufficient, and it so elected because it could not state any better or stronger case.

We therefore maintain, under the undisputed facts of this case, as shown by the Ketchum record, that the excuse given by the appellant for not defending the original suit, and for not filing this bill until 1880, though the facts constituting the alleged fraud were fully known, is without any basis of fact. Leaving out of view the contract with Garrison as the reason why no defense was made, and looking alone to the fact of knowledge of the fraud, and the delay, we have a plain case of *unexcused laches*. We submit with the utmost con-

fidence that the appellant is precluded from maintaining the present suit by reason of negligence or lapse of time, and the acquisition of intermediate rights.

This is so clearly shown in the brief of Mr. Day, pp. 39–44, and particularly in the opinion of McCrary, Circuit Judge, Record, pp. 95, 96, and in the opinion of Mr. Justice Miller, in Wetmore vs. St. Paul, &c., Ry. Co., 3 Federal Reporter, 177, quoted and applied by the Circuit Judge to this case, that no further observations on this subject seem to be required, except possibly to say that of all cases, mining cases not excepted, none more imperatively require the exercise of the well known duty, enjoined by courts of equity, of activity, vigilance and promptness in the assertion of rights on the part of parties aggrieved than railway foreclosure decrees, where the title acquired is, as in this case, almost invariably made the basis of new issues of stock and bonds, which are sold in the markets as negotiable securities. In fact, not only did the new company defendant, in November, 1876, issue the $800,000 stock and $4,500 bonds, but has itself consolidated in 1880 with six other companies and issued $30,000,000 of stock and a consolidated mortgage for $30,000,000, all outstanding and all resting upon the foreclosure decree and sale here sought to be overthrown, as respects the road from St. Louis to Kansas City.

II.

The complainant corporation and its stockholders had full knowledge of the frauds now complained of, long prior to the foreclosure decree, and full opportunity to use them in defense to the foreclosure suit, and this is shown by the record of the foreclosure suit: the demurrer was, therefore, rightly sustained.

If this bill had been filed by Mr. Cowdrey in his own name, or by his associates in theirs, there would be no room for discussion. They are of record in the Ketchum case, not only as having made use of the charges now made in the bill to obstruct that foreclosure, but as having sold out their obstructive value, for a consideration, to the grantors of the principal defendant in this suit. For that consideration they consented to the decree, and the decree accordingly is a consent decree in terms. The case against them is entirely complete.

Hence they have brought this bill in the name of the corporation. Their claim apparently is,

1. The bill and exhibits disclose that *some* stockholders had full knowledge of the foreclosure, and consented, but do not affect *all* of the stockholders with such knowledge and consent.

2. The corporation represents *all* of the stockholders. It is, therefore, not estopped by the knowledge and consent of any part of them, however many.

The first answer is that the bill and exhibits disclose that not only *some* but all the stockholders are chargeable with notice. This was the conclusion of the Circuit Court, as shown by the paragraphs quoted above from the opinion (*ante*, *p.* 4). That there was no error in this may safely be left to a careful review of what was before the Court.

Aside from this, the general proposition urged is no more applicable to a suit against a corporation not faithfully defended than to any other fancied or or real wrong done to a corporation by the persons in control. If, whenever a change of management occurs the new control may sue, and claim that no degree of knowledge or approval or consent by the stockholders at the time estops the corporation from complaining afterwards so long as there is any stockholder who did not have personal knowledge, such a doctrine must not only henceforth embarrass all corporations in their dealings, but embarrass prudent men in accepting or discharging trust or employment of any confidential or discretionary nature for them.

The bill, exhibits and record taken together disclose the following:

~~1. The charges of fraud are intrinsically improbable. Apparently they arise only from the imagination or motives of one of the appellant's stockholders, appellant's counsel in this suit. His constitutional avidity for such charges, however baseless, is often deprecated by his friends and is most unhappily displayed in his attack on Circuit~~

~~Judge McCrary, speaks in his brief filed for this hearing.~~

2. The same unhappy character affects the charges which are the substance of the bill of complaint in this suit.

The case which the bill attempts to make is one of a great and atrocious fraud, in behalf of which and against most needed justice a technical defense has by a strained decree been held to be effectual.

The case which *is* made by the record in the suit in which the decree complained of was rendered is entirely different. The fraud is shown to consist, not in the matters charged, but in the fraudulent iteration of improbable charges. The demurrer is seen to be held good, not as a technical defense against an actual fraud, but as a substantial defense against technical and fraudulent attacks upon an honest purchase. ~~Their origin, as charges, is obvious. So far as disclosed, it is traceable to Mr. Cowdrey, and to his psychological proclivities above referred to.~~

3. From the day of the commencement of the Ketchum foreclosure suit, Cowdrey has been urging these charges upon everybody's attention who was or is interested in the road.

(*a*) He embodied them in a bill of complaint filed November 13, 1875, almost on the day when (Nov. 11, 1875) the Ketchum foreclosure was begun. This

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~~A saying common among lawyers is that, when a man is drowned, it is immaterial, as regards either of two things, he can go down the stream and never rise to the surface or he can appeal his case. This gentleman has appeared he could do both, and has taken this Court for the latter.~~

was amended and amplified February 7, 1876. HE NEVER VENTURED TO ATTEMPT TO PROVE THE ALLEGATIONS OF THIS BILL. (*See Ketchum Record, original, p. 218, reprint, p. 167; return to alternative mandamus, also original, p. 54, reprint, p. 63; Petition of Cowdrey et al. to be made parties, p. 22, reprint*).

(*b*) To give him the fullest opportunity to make such proof, the Pacific Railroad, now appellant, in its answer filed February 7, 1876, to the Ketchum foreclosure suit, expressly states that it

> "Is informed that a portion of said stockholders claim that they (the debt and mortgage) are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same. Therefore the defendant asks this Honorable Court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper."

See Answer of Pacific R. R., Ketchum Record (original, p. 16, reprint, p. 20).

Afterwards, viz., April 25, 1876, and by leave of Court, T. P. Akers, a stockholder, and the County of St. Louis, a creditor claiming a lien, filed their substituted joint answer and cross-bill in which the Cowdrey allegations of fraud are detailed at length, the same as in the bill now before the Court.

See this answer and cross-bill, Ketchum Record, original, pp. 25–38, reprint, pp. 29–44. Akers original answer and cross-bill, filed February 7, 1876, see Circuit Court Record, p. 32, et seq.

As early as March 25, 1876, a number of other stockholders, Peter Marie, Frank A. Otis,

Robert L. Cutting, Jr., James D. W. Cutting and George R. Fearing, filed their petition asking to be made parties defendant, and to adopt the answer and cross-bill of T. P. Akers, which had been filed February 7, 1876.

See Ketchum Record (original, p. 19, reprint, p. 22.)

THE RECORD DISCLOSES NO ATTEMPT EVER TO PROVE THE AVERMENTS OF THIS ANSWER AND CROSS-BILL OR TO HAVE THE MOTION GRANTED AND MARIE ET AL. LET IN AS PARTIES DEFENDANT.

(*c*) March 27, 1876, occurred the annual meeting of stockholders. The law of Missouri authorized this meeting to deal absolutely with any matter of the corporate affairs. (For this statute and its legal effect see Mr. Day's brief for this hearing, pp. 24, 25).

The full proceedings of this meeting were not before the Circuit Court. Enough was, however, before it to draw out an express reference to its binding force against all of the shareholders (*Record, p. 255*).

In one of his numerous petitions Cowdrey sets out (*Ketchum Record, original, p. 50; reprint, p. 59*) that at that meeting a resolution was adopted asking the directors to employ Messrs. Glover & Shepley as attorneys to aid in resisting the foreclosure suits then pending. This was two days after Marie, Otis, Fearing and the two Cuttings had petitioned to intervene, and the attorneys were the same who afterwards filed Cowdrey's own petition in which this resolution is recited. They are also the attorneys who afterwards took the appeal, and

who are solicitors for complainant in this suit. The resolution shows plainly that at this meeting Cowdrey had repeated his asseverations, putting the whole matter within the knowledge of the corporation in its primary capacity as a meeting of shareholders assembled in obedience to the statute and clothed by it with full powers.

The proceedings of the Board, next day, on receipt of this resolution, are part of the Ketchum record.

They simply voted "no" on a resolution to comply with the request. By so doing they declined to accept the imputation on their counsel, Mr. Baker, and *declined also to commit themselves to urging a false defense.* That this was their view and purpose is fully disclosed by the Ketchum record. On page 134 of that record (reprint p. 119) is found a full expression of their views from the beginning. The italics are our own.

"ST. LOUIS, October 7th, 1876.

"MESSRS. GLOVER & SHEPLEY, Attorneys for stockholders, etc.

"GENTLEMEN—In answer to your notice just received, I beg to enclose copy of resolutions adopted by the Board of Directors of the Pacific Railroad at a special meeting held this morning, and also a copy of the opinion of the Receivers as to the value of the property.

"The Board of Directors now are, and have been at all times, unanimous in their desire to do all in their power to protect the interest of the stockholders of the company.

"Learning that Mr Cowdrey and other stockholders of the company wished to defend, while we did not approve of their action, we, feeling that we could do them no possible wrong, asked in our answer to the bill of foreclosure that the stockholders

might have leave to defend, and such leave was granted by the Court, and an answer and cross-bill were filed by permission of the Court, by Mr. Akers, on behalf of himself and all other stockholders who might wish to join.

"*If Mr. Cowdrey and his associates are really sincere in their desire to defend the foreclosure, why did they refuse to join with Mr. Akers; or, rather, why did they voluntarily withdraw after joining with him in the defense?*

"We had supposed they had become satisfied that a defense would be useless.

"This was our view of the matter, and we now ask you the following questions:

"1st. If the Receivers of the road, Messrs. Beach and Stephens, who have every facility for knowing the facts, are correct in their views as to the value of the property, can any good result from a reopening of the litigation?

2d. Are not the directors of the company estopped from assailing the validity of the third mortgage bonds, by action of the stockholders in July, 1875, which authorized, by an almost unanimous vote, the issuing of those bonds?

"Again assuring you of the willingness of the directors to do all in their power to protect any real interests of the stockholders,

I am, very respectfully,
(Signed) CHAS. P. CHOUTEAU,
President.

All of the stockholders of the company are presumed to have known of the affairs discussed at the annual or any regularly called meeting of the stockholders.

Phosphate of Lime Co. vs. Green, L. R., 7 Com. Pl., 43, 65.

It is the duty of a stockholder, knowing that a wrongful act is being done by his company, to make application to a court of equity to prevent it; and if he does not assert his right with diligence, he

thereby "gives rise to a new equity against himself."

Graham vs. Railway Co., 2 MacN. & Gordon, 146, 157; S. C., 6 Eng. L. & Eq., 144, 146.
Hodges vs. N. E. Screw Co., 3 R. I., 18, 19.

In Graham vs. Railway Company, *supra*, it appeared:

"The directors of a railway company, with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion only of the works. On an application by an individual shareholder on behalf of himself and the other shareholders for an injunction to restrain this proceeding, the Court refused to interfere on the ground of the acquiescence of the plaintiff, and also that the other shareholders had for *eighteen months* previously to filing the bill known, or had means of knowing, the acts complained of."

Lord Chancellor COTTENHAM, in delivering the opinion, says:

"Was it not then the *duty* of those who meant to dispute this course of proceedings, to make an application at once to a Court of Equity to prevent it? It seems to me that any member knowing that the company intended in the then state of their finances to go on with the works as far as they could, *and not making such an application, thereby gave rise to a new equity against himself* depriving him of the right to prevent the company from doing that which was contrary to the general rights of the shareholders."

This is especially true where the directors who threaten to commit, or are committing, the fraud

are doing so by the direction of the majority of the shareholders or where the shareholders are for any reason powerless to change the directors; in such case the shareholders have a clear and established right to defend for the company or to use its name to procure the needed relief.

Attention is invited to the following recent cases on this precise point.

> Meniers vs. Hooper's Telegraph Works, Law Reports, 9 Chancery Appeals, 350; followed Mason vs. Harris, L. R., 11 Chan. Div., 97; Goodwin vs. Canal Co., 18 Ohio St., 169.

It follows that in the very case stated in this bill as for relief, viz.: that the Pacific Company was "imprisoned and under hostile control," the Cowdrey party had a perfect and plain right to set up the fraud, and their failure to do so for any cause, and wholly irrespective of the Garrison agreement, would originate new equities against them and subject them to the doctrine of courts of equity, whereby delay and laches are discontinued.

But the general right of shareholders under the circumstances to be heard in the original suit is not very material to be considered, for the reason that the Company's answer invited them to be heard, and the Court recognized and allowed the right.

(*e*) Finally, Cowdrey and all who had at any time adopted his asseverations of fraud in issuing the third mortgage bonds, had agreed with the holders of these bonds upon an estimate of the obstructive value of their charges, and had sold out

their resistance at that price. It was before the Circuit Court at the hearing to this suit (Ketchum record, original, pp. 103, 111 and 115; reprint, pp. 103, 107 and 109), that at the very time the bill in the present case was filed, Cowdrey, Cutting, Marie, Otis, Fearing and Denny were (as they still are) pressing a suit against Garrison in the Superior Court of New York City. In the complaint in that case Mr. Cowdrey, as plaintiff for himself and his associates, says: "THE PLAINTIFFS AVER THAT WITHOUT THEIR CO-OPERATION AND CONSENT THE DECREE OF FORECLOSURE AND SALE WOULD NOT HAVE BEEN MADE."

It was therefore plainly before the Circuit Court that prior to the entry of the decree which is here complained of.

I. Cowdrey had made the same allegations of fraud in the creation of the debt the basis of a suit in his own name, which suit was begun at the same time with the Ketchum suit, November, 1875, and which at the time of the return to the petition for mandamus (November 20, 1876,) he had made no effort to support by proofs, while the foreclosure suit had in the meantime been deliberately carried to a close.

II. The Pacific Railroad Company, in reply to his aspersions, had by its answer expressly asked that the Court would permit any stockholder to come in and set up as a defense what Cowdrey asserted in his bill.

III. One stockholder for himself and all others has actually come in and been made a party and set up as a defense the Cowdrey averments in detail.

IV. Several other stockholders had intervened by petition and adopted the same averments.

V. At an annual meeting immediately after, the same allegations of fraud were laid before the stockholders as a body, and they had taken with regard to them the action they thought best.

VI. The decree was entered three months later, in June, 1876, and the sale confirmed in October following, the Receivers were thereupon discharged, and the property delivered. The June term closed three weeks later.

All the persons who at any time had taken any interest in the Cowdrey averments, including Cowdrey himself, were in Court and advised of the proceedings; and all of them who were parties had *withdrawn the issue* raised by their intervention.

VII. This had been done under an agreement made by Cowdrey *aliunde*, whereby he had stipulated for himself and his associates to sell out their opposition. The price was to be an interest in the purchase without a contribution to its cost.

VIII. The decree of sale was thereupon made a a consent decree. Just what it contained was as much within the knowledge of all parties as it was within the contemplation of the Garrison agreement. A consent decree for sale was exactly in line with that agreement, which was a consent, for a consideration, to a sale.

The appellant's position is that the action of the stockholders in making the Garrison agreements and in the suit to enforce them do not bind the corporation as the trustee of *all* the stockholders, or

estop it to set up the alleged fraud in procuring the foreclosure decree.

More shortly stated, the appellants claim that the Pacific Railroad in its corporate capacity can again be restored to the *railroad* in *this suit*, and its stockholders can recover the *value* thereof in *the New York suit*.

This leads us to consider next the effect of the Garrison agreement, which we will now proceed to show is a complete defense to the case made by the bill of complaint, and the suit in New York upon it is a reiterated and continuing affirmation of the validity of the foreclosure decree.

III.

The Garrison contract and its effect.

THE WRITTEN AGREEMENT OF MARCH 29, 1876, AND ITS ORAL MODIFICATION IN JUNE, 1876, AFTER THE FORECLOSURE DECREE, BETWEEN THE STOCKHOLDERS OF THE PLAINTIFF AND COMMODORE GARRISON, AND THE PENDING SUIT IN NEW YORK BY THE STOCKHOLDERS TO ENFORCE THE SAME AGAINST HIM, CONSTITUTE A FULL AND UNANSWERABLE DEFENSE TO THE FRAUDS ALLEGED IN THE BILL OF COMPLAINT AND A CONFIRMATION OF THE DECREE.

1. This agreement and the record of the said suit against Garrison are part of the record of the Ketchum foreclosure suit, and as such brought with-

in judicial cognizance by the demurrer to the bill of complaint in this cause.

(*a*) This being a bill to impeach a decree of the same Court for fraud, that decree and the pleadings and proceedings leading to it are, by the very form and nature of the suit, necessarily before the Court.

See on this point MR. DAY'S argument, pp. 12–14, and cases cited.

(*b*) But if it were otherwise, the bill of complaint in this suit *expressly refers to*, and makes part thereof, "the files and records" of the foreclosure suit, and "the records of the Supreme Court" in the same case, including the "motion to dismiss" the appeal in the Supreme Court, and the present plaintiff's, "reply to motion and exhibits."

Thus the bill of complaint refers to the record of of the Circuit Court in the foreclosure suit as follows:

"Your orator prays liberty to refer to the files and records of said United States Circuit Court, in the case of George E. Ketchum vs. Pacific Railroad *et al.*, to show the collusive, irregular and fraudulent character of the legal proceedings," &c., &c.

Record in this suit, p. 12, par. 26.

So the bill of complaint refers to the Ketchum record in the Supreme Court as follows:

(P. 16) "Rec., p. 7;" (P. 17) "Motion to dismiss, p. 47;" (P. 17) "Record U. S. Supreme Court, No. 242, p. 5, and motion to dismiss, p. 16;" (P. 17) "Record U. S. Supreme Court, p. 45;" (P. 18) "See p. 6 of additional exhibit, to reply to motion to dismiss;" (P. 19) "Record, p. 44."

(*c*) The Pacific Railroad (the present plaintiff and appellant) appealed through the stockholders' action (Ketchum record, p. 76-84) from the foreclosure decree and the decree confirming the sale thereunder,

to this Court, and the case was No. 242, October Term, 1878.

In this Court, the respondents in that appeal, viz., the plaintiffs in the foreclosure suit, as well as the new company (the Missouri Pacific Railway Company) which had acquired the property, made a motion to dismiss the appeal on two grounds:

1. The decree was a *consent* decree, and therefore not appealable.

2. The agreements with Garrison of March and June, 1876, and the then and now pending suit in New York to enforce them, were a waiver of all errors in the decree.

The record of the proceedings on the "motion to dismiss the appeal" is reprinted in the Ketchum Record from pp. 93–148.

In support of the second ground to dismiss the appeal the moving parties filed exemplified copies of the record of the suit in New York on the Garrison agreement.

Statement of motion on that behalf: See Ketchum Record, pp. 97, 98.

Copy of complaint in suit against Garrison in New York: See Ketchum Record, pp. 104–115.

Copy of Garrison agreement of March 29, 1876: Ketchum Record, pp. 109, 110.

The Pacific Railroad (present appellant), in its corporate capacity, filed an "answer to the motion

to dismiss," signed "PACIFIC RAILROAD, BY N. A. COWDREY, *Solicitor*."

Ketchum Record, pp. 131–138.

This answer *expressly admits* the making of the *Garrison contract* as set forth in the motion to dismiss, and admits also the *record of the suit against Garrison* in New York, as set forth in that motion.

Ketchum Record, p. 133, quoted at large *infra*.

The Garrison agreement and the record of the suit in New York to enforce it being admitted by the present appellant, particular attention is now asked to the allegations in the New York complaint, and to the nature of the agreements with Garrison on which the complaint in that suit is founded.

Ketchum's Record, pp. 104–111.

The complaint is thus entitled:

"In the Superior Court of the City of New York.
PETER MARIE, FRANK A. OTIS, GEORGE FEARING, N. A. Cowdrey, Robert L. Cutting, Jr., and Jacob Cromwell, Plaintiffs,

AGAINST

CORNELIUS K. GARRISON and JOHN T. DENNY, Defendants."

The complaint first states the character of the parties. To show a consideration for the compromise or agreement with Garrison the complaint avers that the validity of the third mortgage bonds was disputed. It then proceeds (the italics are ours):

THIRD. That a collusive suit in the interest of said Garrison, and those associated with him, had been commenced in November, 1875,

by one George E. Ketchum, who claimed to be a holder of said bonds, to foreclose said mortgage, which suit was then pending in the Circuit Court of the United States for the Eastern District of Missouri; that said Garrison was admitted as a co-complainant in said suit April 3d, 1876, and became the principal and active party in prosecuting the same.

That certain stockholders of said Pacific Railroad had, previous to the making of the agreement hereinafter set up, intervened in said foreclosure suit, and filed an answer and cross-bill alleging collusion and fraud on the part of the directors of said Pacific Railroad in the issue of said bonds, and in the mortgage made to secure the payment thereof, and in the defense or want of defense made in the said foreclosure suit; that some of the plaintiffs above named had filed a petition in said foreclosure suit to be made parties defendant to said suit, and to be allowed to intervene and defend the same in their own behalf and in behalf of all other stockholders.

[The character and earnings of the road and the incumbrances thereon are here described.]

FIFTH. That on or about the 29th day of March, 1876, with *a view of compromising said conflicting claims and establishing the validity of said debt of* $4,000,000 in the hands of said Garrison, the defendant Garrison and others of his associate bondholders, *and to prevent the plaintiffs from defending said foreclosure suit, and in consideration of the relinquishment by the plaintiffs of all further opposition to said foreclosure suit*, the said Garrison, the defendant, entered into an agreement with plaintiffs, evidenced in part by a letter written by him to some of the plaintiffs and the defendant Denny, a copy of which is hereto attached, marked "A," and the same is made a part of this complaint.

SIXTH. The plaintiffs aver that they and the defendant Denny *performed and fulfilled all the preliminary obligations in the said agreement contained and agreed to be performed on their part and behalf, and in consequence thereof said defendant Garrison was enabled to procure a judgment and decree of foreclosure on or about the 6th of June*, 1876, and a sale of said premises on or about the 6th day of September, 1876, which sale was confirmed by the Court in the month of October, 1876, viz., October 6th, which confirmation was modified October 23d, 1876.

SEVENTH. The plaintiffs say that in the month of *June*, 1876, [that is, *after* the decree was entered] at and in the City of New York, the plaintiffs and said Denny, at the special interest and request of the said defendant, Garrison, surrendered the aforesaid letter to said Garrison, and in consideration of such surrender and of the plaintiffs' consenting to a modification of the terms of said agreement with

said Garrison as contained, in part, in said letter, said Garrison promised to and agreed with the plaintiffs and said Denny, that in the event the said Pacific Railroad (of Missouri) should be sold under *the decree of foreclosure in said suit*, and in event that he, said Garrison, or any one for him, should become the purchaser thereof, he would forthwith organize a successor company under the laws of the State of Missouri and would convey or cause to be conveyed thereto all the property of the said Pacific Railroad purchased at the said foreclosure sale under said decree; that the capital of the said successor company should not exceed eight millions of dollars in amount, and that after executing new bonds and a new mortgage in the amount of four millions five hundred thousand dollars, to be issued and used in satisfying and *paying off the claims of the said third mortgage bondholders, or of the holders of the income and improvement bonds of said company, he would deliver to the said plaintiffs and said Denny, in return for the amount of stock of the Pacific Railroad, so as aforesaid held by them, thirty-six thousand full paid shares, of the par value of one hundred dollars each*, amounting in the aggregate to the sum of $3,600,000, which stock was to be issued by the said successor company, and the said Garrison then and there promised to and agreed with the plaintiffs and said Denny to purchase the said property at the said foreclosure sale, and assured them of his power and intention of protecting them in their rights of property as stockholders of the said Pacific Railroad.

Ketchum Record, pp. 105, 106.

* * * * * * * * *

THE PLAINTIFFS AVER THAT WITHOUT THEIR CO-OPERATION AND CONSENT, THE DECREE OF FORECLOSURE AND SALE WOULD NOT THEN HAVE BEEN MADE, OR MADE AT ALL UNTIL AFTER A TRIAL BY THE COURT, THE RESULT OF WHICH TRIAL WAS IN DOUBT. PLAINTIFFS CLAIMING, AS ABOVE SET FORTH, IN RELATION TO THE BOND AND MORTGAGE GIVEN TO SECURE THE PAYMENT OF THE SAME.

Garrison's breach of this contract is alleged. The complaint proceeds:

"That the defendant John T. Denny refuses his consent to be joined as plaintiff, and he is therefore made a party defendant in this action.

Wherefore the plaintiffs demand judgment againt the defendant Garrison, in the sum of three million six hundred thousand of dollars, with interest from October 24th, 1876, and the costs of this action.

THE PLAINTIFFS,
By TREMAIN & TYLER,
Attorneys."

This complaint is verified by Mr. MARIE (the present Vice-President of the appellant), Mr. CUTTING (the present President), and Mr. COWDREY (the Chairman of the Stockholders' Committee).

Ketchum Record, p. 109.

THE ANSWER of the Pacific Railroad (present appellant), in the Supreme Court, as to the Garrison agreement and the New York suit thereon, is given below, for the reason that it is the same answer which is now made in the argument of the counsel for the appellant to reverse the decree dismissing the present bill (italics ours).

"6th. The *Pacific Railroad admits* that certain individual stockholders did make a contract with C. K. Garrison, as set forth in the petition to dismiss (pp. 29 and 33), *the effect of which was to make good the bonds claimed and believed to have been fraudulent*, held and represented by Garrison, known as third mortgage bonds, and to give ALL *the stockholders the same number of shares or equity in the property as they held before validating said bonds.*

But it avers that *it was no party to said agreement*, and that Garrison, as soon as he got said decree and sale which he supposed put his bonds beyond controversy, *at once commenced to cheat and defraud the stockholders* by refusing to keep his agreement with them, which, when he made, he called upon God, and his (Garrison's) son and executor, in the most solemn manner to witness his good faith and sincere intention to keep and perform said agreement.

That it is true said individual stockholders have brought suit in the City of New York against said Garrison for the damages sustained by them for the breach of his agreement, as shown on pp. 20 and 41 of petition to dismiss.

The Pacific Railroad avers that it was no party to said agreement made with said individual stockholders, and that it is not a party to said suit against Garrison pending in the City of New York, or, rather, in the Court of Appeals at Albany. The record set forth in said motion to dismiss (pp. 34 and 41), shows that Garrison, while admitting that he made said agreement, denies its validity, hence he ought not to be allowed here to claim any advantages under an agreement which he denies in the tribunal where the aggrieved parties are seeking to enforce it."

Ketchum Record, p. 133.

2. The Garrison agreement and the suit to enforce it are as binding upon all the stockholders as they are upon part of them, and constitute a complete and unanswerable defense to the relief prayed for in the bill of complaint.

The fraudulent conduct imputed by the bill to the Directors of the Pacific Railroad is not an injury to *part* of the stockholders, but is an immediate injury to the corporation itself, and through it to the shareholders at large and to *all* of the shareholders equally.

This is well put in the leading case of Foss vs. Harbottle, 2 Hare, 461, 490, approved by this Court in Hawes vs. Oakland, 104 U. S., 455.

In Foss vs. Harbottle, *supra*, was a bill filed by Foss & Turton (p. 462), "on behalf of themselves and all other shareholders of the Victoria Park Company" for relief against certain *ultra vires* and fraudulent acts of the directors (p. 488).

Speaking of the nature of the injury caused by the fraudulent acts of the directors, Vice-Chancellor INGRAM (p. 490) says:

> "The Victoria Park Company is an incorporated body, and the conduct with which the defendants are charged is an injury *not to the plaintiffs exclusively;* it is an injury to the whole corporation by individuals whom the corporation intrusted with powers to be exercised only for the good of the corporation."
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> * * * * * *
>
> "The result of these clauses [in the charter] is, that the *directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings;* and, as I understand the act, the proprietors so assembled have the power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

"Now that my opinion upon this may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might *prima facie* entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position. I allude to the mortgaging, in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of Preston vs. The Grand Collier Dock Company (14 Sim., 327; S. C., 2 Railway Cases, 335).

"On the first point it is only necessary to refer to the clauses of the act to show that, whilst the supreme governing body, the proprietors, at a special meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs on the present record. This, in effect, purports to be a suit by *cestuis que trust*, complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is, that those trustees have sold land to themselves, ostensibly for the benefit of the *cestuis que trust*. The proposition I have advanced is, that although the act should prove to be voidable, the *cestuis que trust* may elect to confirm it. *Now, who are the cestuis que trust in this case? The corporation, in a sense, is undoubtedly the cestui que trust; but the majority of the proprietors, at a special meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound.*"

This is especially applicable to the relative powers of the directors and shareholders under the charter of the Pacific Railroad.

See

Charter Provisions and the Act of 1851, Ketchum Record, pp. 96, 97.

It follows from this that the action of the *majority*

of the stockholders, at any annual or regular meeting, upon the question whether the foreclosure suit should be defended, or authorizing a committee to represent the interests of the stockholders, and the action of such committee in the settlement of the controversy, such as the making of the Garrison contract of March 29, 1876, would be binding upon all the stockholders, and it would not be an act absolutely *ultra vires* in the sense that a single stockholder can put a veto upon it.

As the alleged frauds are injuries to the corporation and stockholders at large, let us now see what the records show as to the action of the stockholders.

Action of the Stockholders and of their Committee.

The Ketchum record shows that the stockholders caused N. A. Cowdrey to commence a suit, on behalf of stockholders, based upon the same alleged frauds. The substance of the Cowdrey bill is stated in the Ketchum record in the stockholders' committee's "Motion for liberty to intervene to set aside the decree of June 6, 1876, and sale, and for liberty to demur, answer, plead or appeal."

The Cowdrey bill is by that motion made part thereof and thus becomes part of the record of the Ketchum case, and of the present case.

Ketchum Record, pp. 56, 63.

The original Cowdrey bill was filed November 13, 1875, only two days after the Ketchum foreclosure bill was filed.

Circuit Court Record, p. 1.

It was amended February 2, 1876. The substance of the amended bill is stated by the stockholders' committee on the said motion to intervene in the Ketchum suit.

Ketchum Record, p. 63.

The amended bill signed by Glover & Shepley, as solicitors, is contained in full in the Circuit Court Record (pp. 1–32). Filed with the Cowdrey bill are the minutes of the stockholders' meetings of November 5, 1875 (p. 86), and December 28 and 29, 1875 (p. 80, *et seq.*).

On November 5, 1875, the stockholders of the Pacific Railroad reviewed the situation, and passed resolutions to protect their interests, and

"*Resolved*, That Messrs. N. A. Cowdrey, Jacob Cromwell, Peter Marie, A. W. Shepard, George R. Fearing, F. A. Otis and William H. Morell be and they are hereby a committee on the part of the stockholders to carry these resolutions into effect."

The Cowdrey bill was filed eight days afterwards, and in that bill Cowdrey averred (Circuit Court Record, p. 6):

"2d. And therefore your orator complains and says that he is the owner of one thousand shares, of one hundred dollars each, of the capital stock of the defendant, the Pacific Railroad; that he is *the chairman of a committee of stockholders who*, your petitioner avers, is authorized and does represent in and by this bill of complaint about *thirty-five thousand shares* of said capital stock, amounting to over one-half of the entire capital stock issued by said Pacific Railroad.

"That he brings this bill of complaint, *not only for his own benefit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad who may come in and contribute to the cost and expenses necessary for the prosecution of this suit.*"

This bill was amended February 2, 1876. The

amended bill, filed February 7, 1876, was signed by GLOVER & SHEPLEY, solicitors. In the stockholders' motion to intervene in the Ketchum case, they say:

"Your orators humbly pray the Court to allow them to refer to the said bill in equity in said Cowdrey case the same as if it were set out here at length."

This makes it part of the Ketchum case (Ketchum record, p. 63). On the same day, February 7, 1876, Akers, a stockholder, by *leave of Court*, filed his answer and cross-bill to the Ketchum suit, setting up the frauds alleged in the present bill, and the Akers answer and cross-bill was signed by GLOVER & SHEPLEY as counsel (Circuit Court Record, pp. 32, 79), and it was amended, and the amended answer and cross-bill in the Ketchum case were filed April 25, 1875, and are found in the Ketchum record (Ketchum Record, p. *29 et seq*). On the same February 7, 1876, the much complained of answer of the Pacific Railroad Company was filed, asking that "the *Court permit any stockholder to defend.*"

Ketchum Record, pp. 18, 19.

March 25, 1876, Marie *et al.* filed petition to "be allowed to defend and be made co-defendants with Akers and to adopt his answer and cross-bill."

Ketchum Record, pp. 22, 23.

March 27, 1876, the regular annual stockholders' meeting was held and the foreclosure suit discussed.

Ketchum Record, p. 139.

Note that two days afterward, viz., March 29, 1876, these stockholders made the Garrison agreement to withdraw their opposition to the foreclosure.

Ketchum Record, p. 109.

The *Pacific Railroad* produced, on the motion to dismiss the appeal, the affidavit of Mr. SHEPLEY, who stated the relations of his firm and of himself to the Ketchum suit and decree.

Mr. SHEPLEY swore (italics ours):

"The firm of Glover & Shepley had been, *prior* to 1876, employed by Peter Marie, N. A. Cowdrey, and some others in proceedings instituted to *prevent a foreclosure* of the third mortgage of the Pacific Railroad, in the suit brought by George E. Ketchum and others against said railroad company and others for that purpose, and while after that time *no opposition* was made by said firm, said Glover & Shepley did not consider themselves to be authorized to assent to anything on the part of their clients, and did not assent to said foreclosure or to anything looking to said foreclosure. I recollect that at some time in the spring of that year, James Baker, accompanied by Frank J. Bowman, came to my office in St. Louis, on his own motion and without any agreement or understanding with me, and somewhat to my surprise at the time, as I remember, and Mr. Baker said to me that he had in his hands what he said was the draft of a decree which he proposed to present to Judge CALDWELL. [Judges CALDWELL and TREAT held the Court in June when the decree was rendered.] I have no recollection of Mr. Broadhead's accompanying him, but it may have been so. According to my present recollection I did not read it. This is my strong recollection. *Mr. Baker very likely stated to me its general features. I neither assented or dissented, as I had nothing to do in the matter.* My recollection is that I was in Court in April and in June, 1876, when the matter of a decree in the case came up, but I certainly never urged the Court to render this or any decree in said cause. I have read what my partner, S. T. Glover, has stated in his affidavit in reference to what Mr. Baker stated in Court in reference to my assenting to said decree. He repeated the observation of Mr. Baker to me at that time, and I said to him that Mr. Baker was entirely mistaken in his recollection of the matter; *that I was entirely passive in the matter, neither assenting or dissenting. This was the fact. And further said affiant says not.*"

December 14, 1876, at an adjourned stockholders meeting, it was resolved, *inter alia:*

"RESOLVED, by the stockholders of the Pacific Railroad, in an adjourned annual meeting, assembled at the City of St. Louis, this 14th day of December, 1876, that for the protection of the interest of said Pacific Railroad and its stockholders, *Robert L. Cutting, Jr., George R. Fearing, David Rankin, Jr., Peter Marie, and N. A. Cowdrey,*

or a majority of them, be and they are hereby appointed *a special committee*, and the agents of said Pacific Railroad and its stockholders, with full power and authority to commence, prosecute, and defend all and each of any suits at law, or in equity, as they or a majority of them shall think for the interest of said Pacific Railroad, or of its stockhold[er]s, should be prosecuted or defended, including the right to take appeals, bring a writ of error, or to make motions in or for a review of any suit heretofore commenced against said Pacific Railroad."

The foregoing review shows two things of importance :

1. The nature of the Stockholders' Committee and that they were appointed in behalf of *all* the stockholders and represented *all*.

2. That on the making of the Garrison contract of March 29, 1876, more than three months before the foreclosure decree was rendered, the Stockholders' Committee withdrew, as they state in the complaint in the Garrison suit, all opposition to a foreclosure decree being rendered.

Effect of the Garrison agreement and the suit thereon.

As the agreement of Garrison was made with the Stockholders' Committee, in respect to an alleged injury or menaced injury to *all* the stockholders, and as in consequence of that agreement, the pending stockholders' suits and proceedings were withdrawn or abandoned, and as the Garrison agreement of March 29, 1876, makes provision for *all* the stockholders, it is plain that the pretense now set up to avoid the effect of that agreement, viz., that it was made with *certain individual stockholders* and not in behalf of and for the benefit of all, is as destitute of foundation in fact as it is in morality.

If the Pacific Railroad succeeds in this suit every stockholder will be equally entitled to his share of the fruit—or plunder. To this day that agreement has never been repudiated by a single shareholder. So if the stockholders succeed against Garrison, every stockholder will be entitled to his share of the proceeds of that judgment.

The stockholders committed their whole interests to this committee, and as they are entitled to the benefits of the Garrison contract, so they are bound thereby, and cannot now be heard either directly or *indirectly* as here attempted, through the corporation, to impeach the decree to which they assented.

The Garrison suit which is still pending and being prosecuted with vigor, is a *continuing affirmation* of the validity of the foreclosure decree, out of the assent to which the contract with Garrison originated.

The Garrison agreements and the complaint to enforce them, have been construed by the Court of Appeals of New York in

Marie *et al.*, vs. Garrison, 83 N. Y. 14.

The Court held that the allegation:

"That the plaintiff had relinquished their opposition to the foreclosure in consideration of the agreement of Garrison contained in that letter" (of March 29th, 1876) "constituted a consideration which would uphold the defendants promise" (p. 26).

Such relinquishment of opposition to the foreclosure decree is the sole consideration of the promise of Garrison, and the sole foundation of the pending suit against him.

The Court of Appeals further held that the agreement was valid on its face:

> "It is claimed that this new arrangement was illegal on two grounds: First, that it was a collusive arrangement between the parties to establish a fraudulent and invalid debt, and procure a sale of the property of the company thereon, to the prejudice of the other stockholders and creditors; and second, that the agreement was calculated to prevent competitive bidding between the parties on the foreclosure sale, contrary to the general principles and policy of the law. We think neither of these points is well taken" (p. 27).

The Court will find the entire opinion of the Court of Appeals interesting from the light which it reflects upon the present case, as showing the *equestrian skill of these plaintiffs in riding at the same time two horses going in different directions.*

DILLON & SWAYNE,
For the Missouri Pacific Railway
Company, Appellees.